



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



HARVARD LAW SCHOOL
LIBRARY

85 June 22/49
REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF DECEMBER 9, 1902, TO
AND INCLUDING DECISIONS OF FEBRUARY 24, 1903.

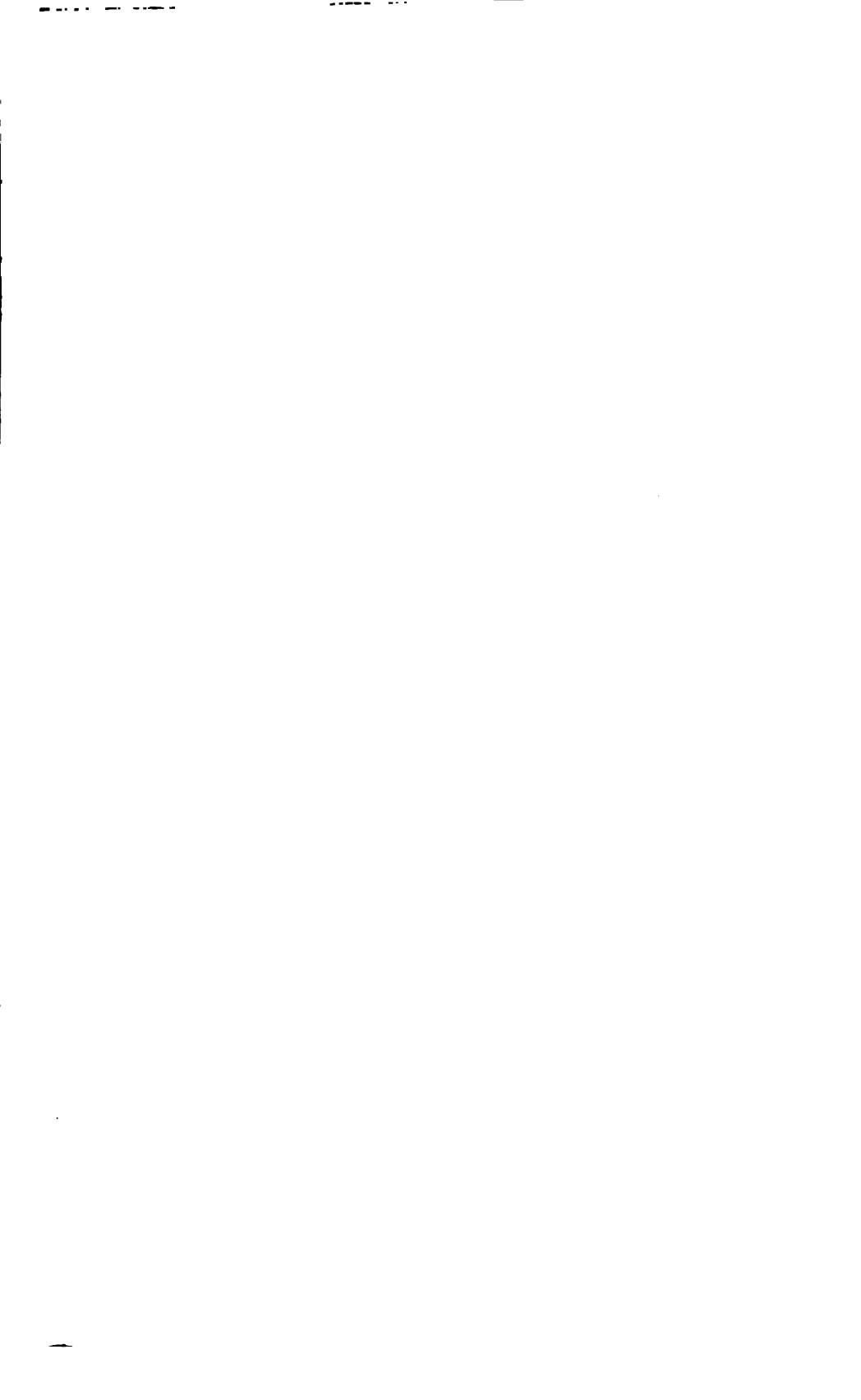
WITH

NOTES, REFERENCES AND INDEX

By EDWIN A. BEDELL,
STATE REPORTER.

VOLUME 173.

ALBANY
J. B. LYON COMPANY.
1903.



Rec. June 13, 1903.

Entered; according to Act of Congress, in the year nineteen hundred and three,

By JOHN F. O'BRIEN, SECRETARY OF THE STATE OF NEW YORK,

In trust for the benefit of the People of the said State, in the office of the Librarian of
Congress, at Washington, D. C.

JUDGES OF THE COURT OF APPEALS.

ALTON B. PARKER, CHIEF JUDGE.

JOHN C. GRAY,

DENIS O'BRIEN,

EDWARD T. BARTLETT,

ALBERT HAIGHT,

CELORA E. MARTIN,

IRVING G. VANN,

ASSOCIATE JUDGES..

EDGAR M. CULLEN,

WILLIAM E. WERNER,

JUSTICES OF THE SUPREME COURT SERVING AS
ASSOCIATE JUDGES.*

* Designated by the Governor January 1, 1900, under section 7 of article VI of the Constitution, as amended in 1899.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A.		B.	
	PAGE.		PAGE.
Abell, People ex rel., v. Coler.	589	Birdsall v. Wheeler.....	590
Adam, People ex rel. Myer		Birrell v. N. Y. & Harlem R.	
v.....	582, 599	R. Co.....	644
Adams, People ex rel. Sheridan		Bissell, In re, v. Village of Larch-	
v.....	611	mont.....	595
Adee v. Nassau Electric R. R.		Bloss, In re City of Rochester v.	646
Co.....	580	Board of Education, City of	
Akers, In re (Will).....	620	New York, In re.....	321
Albany County Bank, Reilley v.	583	Board of Education, City of	
Allen, Veazey v.....	359	New York, People ex rel.	
American Press Assn. v. Brant-		Murphy v.....	607
ingham.....	601	Board of Suprs. Delaware Co.,	
Andrews, N. Y. & N. H.		People ex rel. Town of Wal-	
Automatic Sprinkler Co. v....	25	ton v.....	297
Appleby, Robinson v.....	626	Bohemian Roman Catholic	
Arkenburgh, In re (Accounting).	638	Union, Janda v.....	617
Associated Manfrs.' Mut. F.		Bootman, People v.....	622
Ins. Corp'n., Cummer Lumber		Boutin, Slade v.....	592
Co. v.....	633	Brantingham, American Press	
Auburn City Ry. Co., Drake v.	466	Assn. v.....	601
		Breed v. Ruoff.....	340
		Bremer, People v.....	599
		Brereton v. Gilmore.....	592
		Brintnall v. Rice.....	618
		Brooklyn Heights R. R. Co.,	
		Fischer-Hansen v.....	492
		Brooklyn Heights R. R. Co.,	
		Pinder v.....	519
		Brooklyn & Jamaica Bay Turn-	
		pike Co., Carvalho v.....	586
		Brooklyn Wharf & W. Co.,	
		India Wharf Brewing Co. v....	167
		Brown, Hopper v.....	613
		Brown, Hurley v.....	595
		Buffalo, City of, Hamilton v..	72
		Buffalo Natural Gas Fuel Co.	
		v. Barber Asphalt Paving Co.	594
		Burns v. Mullin.....	609
		Burns, People v.....	598

C.	PAGE.		PAGE.
Cammann v. Bailey.....	618	Coleman v. City of New York.	612
Cantor, In re Morrison v.....	646	Coler, People ex rel. Abell v...	589
Card v. Moore.....	598	Coler, People ex rel. Devery v..	103
Carter, Riggs v.....	692		587
Carvalho v. Brooklyn & Jamaica		Colonial Dames of America v.	
Bay Turnpike Co.....	586	Colonial Dames, State of	
Cary, Cottle v.....	624	N. Y.	586
Cattano v. Metropolitan Street		Colonial Dames of America v.	
Ry. Co.....	585	National Socy. Colonial	
Chappel, People ex rel., v. Lin-		Dames of America.....	586
denthall.....	524	Colonial Dames, State of N. Y.,	
Chase, In re (Accounting).....	615	Colonial Dames of America v.	586
Chauvet v. Ives.....	192, 616	Conkling v. Weatherwax.....	43
Citizens' Sav. Bank v. Town of		Continental Nat. Bank v.	
Greenburgh	215	Tradesmen's Nat. Bank....	272
City of Buffalo, Hamilton v....	72	Continental Trust Co., South-	
City of Middletown, Farrell v..	637	gate v.....	602
City of Mount Vernon, Coombs		Coombs v. City of Mount	
v.....	585	Vernon.....	585
City of Mount Vernon, Edwards		Cosgrove v. Metropolitan Street	
v.....	585	Ry. Co.....	628
City of New York, Board Edu-		Cottle v. Cary.....	624
cation of, In re.....	321	Cottle v. County of Erie..	591, 637
City of New York, Board Edu-		County of Erie, Cottle v..	591, 637
cation of, People ex rel. Mur-		Crawford v. Nassoy.....	163
phy v.....	607	Cullinan, In re (Micha).....	610
City of New York, Coleman v.	612	Cullinan, People ex rel. Steven-	
City of New York, Downs v....	651	son Brewing Co. v.....	604, 605
City of New York, Griffith v..	612	Cummer Lumber Co. v. Asso-	
City of New York, O'Keeffe v..	474	ciated Manfrs.' Mut. F. Ins.	
City of New York, Rogers v..	623	Corpn.....	633
City of New York, Schwan v..	32		
City of New York, Sweeny v.	414	D.	
City of New York, Trustees of		Daly, In re.	640
Union College v.....	38	D'Amato v. Gentile.....	596
City of New York, Mayor, etc.,		Davenport, In re (Accounting).	600
of, Fortunato v.....	608	Davis, N. Y. & Rosendale	
City of New York, Mayor, etc.,		Cement Co. v.....	235
of, Haven v.....	611	Decker, People ex rel., v. Mc-	
City of Rochester, In re, v. Bloss.	646	Cue.....	347
City of Watervliet, Kennedy v.	617	Degnon-McLean Contracting	
City Trust Co., Fritz v.....	622	Co., Shilagi v.....	625
Cleveland v. Pomeroy.....	630	Delaware Co., Board Suprs. of,	
Clifford, People ex rel., v. Scan-		People ex rel. Town of Wal-	
nell.....	606	ton v.....	297
Colabel v. Metropolitan Street		Devery, People ex rel., v. Coler.	103
Ry. Co.....	627		587

TABLE OF CASES REPORTED.

vii

	PAGE.		PAGE.
Devery, People ex rel., v. Knox	589	Fenwick v. Metropolitan Street Ry. Co.	638
Devery, People ex rel., v. Murphy	588	Filippelli, People v.	509
Devitt v. Providence Washington Ins. Co.	17	Finch, Gilbert v.	455
Dimon v. N. Y. C. & H. R. R. Co.	356, 635	Fischer-Hansen v. Brooklyn Heights R. R. Co.	492
Donohue, Schieck v.	638	Flanagan v. N. Y. C. & H. R. R. Co.	631
Dounce, Potts v.	335	Fleisher v. Farmers' Loan & Trust Co.	620
Downs v. City of New York.	651	Flynn, O'Sullivan v.	619
Downs, Phelan v.	619	Fortunato v. Mayor, etc., of New York.	608
Drake v. Auburn City Ry. Co.	466	Forty-second St., M. & St. N. Ave. Ry. Co., Riddle v.	327
Dudgeon, Gates v.	426	Fritz v. City Trust Co.	622
Dwight, In re (Accounting).	583		
E.		G.	
Eagan v. Scully	581	Gates v. Dudgeon.	426
Earle v. Earle.	480	Gentile, D'Amato v.	596
Eastern Bldg. & Loan Assn., Vought v.	603	Gilbert v. Finch.	455
Edwards v. City of Mount Vernon	585	Gilmore, Brereton v.	592
Eichorn, Hasbrouck v.	579	Glen, People v.	395
Equitable L. Assur. Socy., Wilcox v.	50, 637	Goshen, Town of, v. Smith.	597
Erie, County of, Cottle v.	591, 637	Grand Lodge A. O. U. W., Roberts v.	580
Erie R. R. Co., Lonergan v.	616	Greenburgh, Town of, Citizens' Sav. Bank v.	215
Evans v. Muller.	601	Greenwald v. Wales.	637
		Griffith v. City of New York.	612
F.		H.	
Fargo, Prentice v.	593	Hamilton v. City of Buffalo.	72
Farmers' Feed Co. of N. J. v. Scottish Union & Nat. Ins. Co.	241	Harney, Leonard v.	352
Farmers' Loan & Trust Co., Fleisher v.	620	Hart, People ex rel., v. York.	610
Farmers' Loan & Trust Co., New England W. W. Co. v.	584	Hartmann, Stedwell v.	624
Farmers' Loan & Trust Co., Rhinelander v.	620	Hasbrouck v. Eichorn.	579
Farrell v. City of Middletown.	637	Hassard v. United States of Mexico.	645
Favo v. Remington Arms Co.	600	Haven v. Mayor, etc., of New York.	611
Feierstein v. Supreme Lodge K. of H.	639	Hearst, Werner v.	641
Feltner, People ex rel. Sands v.	647	Heath v. Koch.	629
Feldman, Rowley v.	607	Helmer v. Morey.	627
		Hess v. Sloane.	616
		Higbie, Barker v.	584
		Hill v. Starin.	633

	PAGE.		PAGE.
Hoes v. N. Y., N. H. & H. R. R. Co	485	Kneeland, Weigley v.	599
Hooker, Barnum v.	689	Knight, People ex rel. N. Y. C. & H. R. R. R. Co. v.	255
Hopper v. Brown.	613	Knox, People ex rel. Devery v.	589
Hurley v. Brown.	595	Kobbe, Satterlee v.	91
		Koch, Heath v.	629
I.			
India Wharf Brewing Co. v. Brooklyn Wharf & W. Co. . .	167	L.	
In re Akers (Will).	620	Larchmont, Village of, In re Bissell v.	595
In re Arkenburgh (Accounting). .	638	Legg, Sweezey v.	597
In re Baker.	249	Lehmaier, Marino v.	530
In re Bissell v. Village of Larch- mont.	595	Leonard v. Harney.	352
In re Board of Education City of New York.	321	Lichtman, People v.	63
In re Chase (Accounting)	615	Lindenthal, People ex rel. Chap- pel v.	524
In re City of Rochester v. Bloss. .	646	Livingston v. Livingston.	377
In re Cullinan (Micha).	610	Loneragan v. Erie R. R. Co. . .	616
In re Daly.	640	Ludlow Street, In re (Opening). .	600
In re Davenport (Accounting). .	600	Lyon Co., People ex rel., v. McDonough.	181
In re Dwight (Accounting).	583		
In re Killan (Estate).	641	M.	
In re Ludlow Street (Opening). .	600	McCue, People ex rel. Decker v.	347
In re Morrison v. Cantor.	646	McDonough, People ex rel. Lyon Co. v.	181
In re Schenectady Ry. Co.	606	McKee Land & Improvement Co. v. Williams.	630
In re Sheldon (Accounting).	287	Maloney v. Iroquois Brewing Co.	303
In re Stewart.	608	Marchese v. Bell Telephone Co. of Buffalo.	628
Iroquois Brewing Co., Maloney v.	303	Marino v. Lehmaier.	530
Ives, Chauvet v.	192, 616	Matter of Akers (Will).	320
J.		Matter of Arkenburgh (Ac- counting).	638
Janda v. Bohemian Roman Cath- olic Union.	617	Matter of Baker.	249
Jessup, Trustees of Southamp- ton v.	84	Matter of Bissell v. Village of Larchmont.	595
Johnson v. N. Y. C. & H. R. R. R. Co.	79	Matter of Board of Education, City of New York.	321
K.		Matter of Chase (Accounting). .	615
Kelrns v. N. Y. & Harlem R. R. Co.	642	Matter of City of Rochester v. Bloss.	646
Kelly v. Moore.	647	Matter of Cullinan (Micha).	610
Kennedy v. City of Watervliet. .	617		
Killan, In re (Estate).	641		
Kirk, Simone v.	7		

TABLE OF CASES REPORTED.

ix

PAGE.	PAGE.
Matter of Daly..... 640	Murphy, People ex rel., v. Board of Education, City of New York..... 607
Matter of Davenport (Account- ing)..... 600	Murphy, People ex rel. Devery v..... 588
Matter of Dwight (Accounting) 583	Myer, People ex rel., v. Adam. 582
Matter of Killan (Estate)..... 641	599
Matter of Ludlow Street (Open- ing)..... 600	N.
Matter of Morrison v. Cantor.. 646	Nassau Electric R. R. Co., Adea v..... 580
Matter of Schenectady Ry. Co.. 603	Nassoy, Crawford v. 183
Matter of Sheldon (Accounting) 287	National Society Colonial Dames of America, Colonial Dames of America v..... 586
Matter of Stewart..... 608	Newburgh Sav. Bank v. Town of Woodbury... 53
Matteson v. Pulser..... 404	New England W. W. Co. v. Farmers' Loan & Trust Co.. 584
Mayor, etc., of New York, For- tunato v..... 608	N. Y. C. & H. R. R. R. Co., Dimon v..... 586, 635
Mayor, etc., of New York, Haven v..... 611	N. Y. C. & H. R. R. R. Co., Flanagan v..... 631
Megowan v. Peterson..... 1	N. Y. C. & H. R. R. R. Co., Johnson v..... 79
Merchant, Banta v..... 292	N. Y. C. & H. R. R. R. Co., People ex rel., v. Knight.... 255
Mertens, Warth v..... 626	N. Y. C. & H. R. R. R. Co., Schuyler v..... 608
Metropolitan L. Ins. Co., Beg- lin v..... 374	New York, City of, Board of Education, In re..... 321
Metropolitan Street Ry. Co., Bertsch v..... 634	New York, City of, Board of Education, People ex rel. Murphy v..... 607
Metropolitan Street Ry. Co., Cattano v. 565	New York, City of, Coleman v. 612
Metropolitan Street Ry. Co., Colabel v..... 627	New York, City of, Downs v... 651
Metropolitan Street Ry. Co., Cosgrove v. 628	New York, City of, Griffith v.. 612
Metropolitan Street Ry. Co., Fenwick v..... 633	New York, City of, O'Keeffe v. 474
Metropolitan Street Ry. Co., Nolan v.. 604	New York, City of, Rogers v.. 623
Middletown, City of, Farrell v..... 637	New York, City of, Schwan v. 32
Miller, Petrie v..... 596	New York, City of, Sweeny v. 414
Moore, Card v..... 598	New York, City of, Trustees of Union College v..... 38
Moore, Kelly v..... 647	New York, City of, Mayor, etc., of, Fortunato v..... 608
Morey, Helmer v..... 627	New York, City of, Mayor, etc., of, Haven v..... 611
Morrison, In re, v. Cantor..... 646	N. Y. & Harlem R. R. Co., Bir- rell v..... 644
Mount Vernon, City of, Coombs v..... 585	
Mount Vernon, City of, Ed- wards v..... 585	
Muhiker v. N. Y. & Harlem R. R. Co..... 549	
Muller, Evans v..... 601	
Mullin, Burns v..... 609	

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
N. Y. & Harlem R. R. Co.,		People ex rel. Devery v. Knox.	589
Keirns v.....	642	People ex rel. Devery v. Mur-	
N. Y. & Harlem R. R. Co.,		phy.....	588
Muhlker v.....	549	People ex rel. Hart v. York....	610
N. Y. & Harlem R. R. Co.,		People ex rel. Lyon Co. v. Mc-	
Siegel v.....	644	Donough.....	181
N. Y. & N. H. Automatic		People ex rel. Murphy v. Board	
Sprinkler Co. v. Andrews..	25	of Education, City of New	
N. Y., N. H. & H. R. R. Co.,		York	607
Hoes v.....	435	People ex rel. Myer v. Adam..	582
N. Y. & Rosendale Cement Co.			599
v. Davis.....	235	People ex rel. N. Y. C. & H. R.	
Niagara Fruit Co., People v...	629	R. R. Co. v. Knight.....	255
Nolan v. Metropolitan Street		People ex rel. Rutherford v.	
Ry. Co.....	604	Stewart.....	651
Norsworthy v. Troy & N. E.		People ex rel. Sands v. Feltner.	647
Ry. Co.....	585	People ex rel. Sheridan v.	
		Adams.....	611
O.		People ex rel. Stevenson Brew-	
O'Connor, Ralley v.....	621	ing Co. v. Cullinan.....	604, 605
O'Keeffe v. City of New York..	474	People ex rel. Town of Walton	
O'Sullivan v. Flynn.....	619	v. Board Suprs. Delaware Co.	297
Olpherts v. Smith.....	593	People ex rel. Tupper Lake	
		Water Co. v. Sisson.....	606
P.		People's Nat. Bank, Van Reed	
Palser, Matteson v.....	404	v.....	314
Parker v. Beer.....	332	Peterson, Megowan v.....	1
Pearsall v. Westcott.....	579	Petrie v. Miller.....	596
People v. Bootman.....	622	Pfeifer v. Supreme Lodge Bo-	
People v. Bremer.....	599	hemian S. B. Socy.....	418
People v. Burns.....	598	Phelan v. Downs.....	619
People v. Filippelli.....	509	Phelps, Stewart v.....	621
People v. Glen.....	395	Pinder v. Brooklyn Heights R.	
People v. Lichtman.....	63	R. Co.....	519
People v. Niagara Fruit Co....	629	Pomeroy, Cleveland v.	630
People v. Prillen.....	67	Porter, Wild v.....	614
People v. Sullivan.....	122	Potts v. Dounce.....	335
People v. Vandervoort.....	594	Prentice v. Fargo.....	593
People v. Wise.....	613	Prillen, People v.....	67
People ex rel. Abell v. Coler...	589	Providence Washington Ins.	
People ex rel. Chappel v. Lind-		Co., Devitt v.....	17
enthal.....	524		
People ex rel. Clifford v. Scan-		Q.	
nell.....	606	Quade v. Bertsch.....	615
People ex rel. Decker v. McCue.	347		
People ex rel. Devery v.		R.	
Coler.....	103, 587	Ralley v. O'Connor.....	621
		Reilley v. Albany County Bank.	583

xi

	PAGE.		PAGE.
Remington Arms Co., Favo v..	600	Simone v. Kirk.....	7
Rhineland v. Farmers' Loan & Trust Co.	620	Sisson, People ex rel. Tupper Lake Water Co. v.....	606
Rice, Brintnall v.....	618	Slade v. Boutin.....	592
Riddle v. Forty-second St., M. & St. N. Ave. Ry. Co.....	327	Sloane, Hess v.....	616
Riggs v. Carter.....	632	Smith, Olpherts v.....	593
Roberts v. Grand Lodge A. O. U. W.....	580	Smith v. Ruggiero.....	614
Robinson v. Appleby.....	626	Smith, Town of Goshen v....	597
Rochester, City of, In re, v. Bloss	646	Smith v. Wilcox.....	581
Rogers v. City of New York...	623	Southampton, Trustees of, v. Jessup	84
Rosa v. Volkening.....	590	Southgate v. Continental Trust Co.....	602
Rowley v. Feldman.....	607	Starbuck v. Starbuck.....	503
Ruggiero, Smith v.....	614	Starin, Hill v.....	632
Ruoff, Breed v.....	340	Stedwell v. Hartmann.....	624
Rutherford, People ex rel., v. Stewart.....	651	Stevenson Brewing Co., People ex rel., v. Cullinan.....	605
		Stewart, In re.....	608
S.		Stewart v. Phelps.....	621
St. Regis Paper Co. v. Santa Clara Lumber Co.....	149	Stewart, People ex rel. Ruther- furd v.....	651
Sands, People ex rel., v. Feit- ner.....	647	Sullivan, People v.....	122
Santa Clara Lumber Co., St. Regis Paper Co. v.....	149	Supreme Lodge Bohemian S. B. Socy., Pfeifer v.....	418
Satterlee v. Kobbe.....	91	Supreme Lodge K. of H., Feier- stein v.....	639
Scannell, People ex rel. Clifford v.....	606	Supreme Tent of K. of M., Weber v.....	599
Schenectady Ry. Co., In re ...	603	Sweeny v. City of New York.	414
Schieck v. Donohue.....	638	Swezey v. Legg.....	597
Schlereth v. Schlereth.....	444		
Schuyler v. N. Y. C. & H. R. R. R. Co.....	603	T.	
Schwan v. City of New York..	32	Taylor v. Taylor.....	266
Scottish Union & Nat. Ins. Co., Farmers' Feed Co. of N. J. v..	241	Third Ave. R. R. Co., Seletsky v.....	645
Scully, Eagan v.....	581	Thousand Island Park Assn. v. Tucker.....	208
Seletsky v. Third Ave. R. R. Co.....	645	Town of Goshen v. Smith....	597
Sheldon, In re (Accounting)...	287	Town of Greenburgh, Citizens' Sav. Bank v.....	215
Sheridan, People ex rel., v. Adams.....	611	Town of Walton, People ex rel., v. Board Suprs. of Delaware Co.....	297
Shilagi v. Degnon-McLean Con- tracting Co.	625	Town of Woodbury, Newburgh Sav. Bank v.....	55
Siegel v. N. Y. & Harlem R. R. Co.....	644	Tradesmen's Nat. Bank, Con- tinental Nat. Bank v.....	272

	PAGE.		PAGE.
Troy & N. E. Ry. Co., Nors- worthy v.....	585	Wales, Greenwald v.....	637
Trustees of Southampton v. Jessup.....	84	Walton, Town of, People ex rel., v. Board Suprs. of Delaware Co.....	297
Trustees of Union College v. City of New York.....	38	Warth v. Mertens.....	626
Tucker, Thousand Island Park Assn. v.....	203	Watervliet, City of, Kennedy v.....	617
Tupper Lake Water Co., People ex rel., v. Sisson.....	606	Weatherwax, Conkling v.....	43
		Weber v. Supreme Tent of K. of M.	599
U.		Weigley v. Kneeland.....	599
Ullrich, Bindrim v.....	587	Werner v. Hearst.	611
Union College, Trustees of, v. City of New York.....	38	Westcott, Pearsall v.....	579
United States of Mexico, Has- sard v.....	645	Wheeler, Birdsall v.....	590
United States Trust Co. v. Wheeler.....	631	Wheeler, United States Trust Co. v.....	631
		Wilcox v. Equitable L. Assur. Socy..	50, 637
V.		Wilcox, Smith v.....	581
Vandervoort, People v... ..	594	Wild v. Porter.....	614
Van Reed v. People's Nat. Bank.....	314	Williams, McKee Land & Im- provement Co. v.....	630
Veazey v. Allen.....	359	Wise, People v.....	613
Village of Larchmont, In re Bissell v.....	595	Woodbury, Town of, Newburgh Sav. Bank v.....	55
Volkening, Rosa v	590		
Vought v. Eastern Bldg. & Loan Assn.....	603	Y.	
		York, People ex rel. Hart v....	610

TABLE OF CASES

CITED IN THE OPINIONS REPORTED IN THIS VOLUME.

A.		PAGE.
Adams v. Berger.....	18 N. Y. Supp. 83.	452, 454
Adams v. McKenzie.....	32 L. J. C. P. 92.....	21
Adams v. People.....	47 Ill. 376.....	516
Adams v. Stevens.....	26 Wend. 451.....	495
American Sugar Ref. Co. v. Fancher.....	145 N. Y. 552.....	58
Amherst College v. Ritch.....	151 N. Y. 282.....	650
Appel v. Buffalo, N. Y. & P. Ry. Co.....	111 N. Y. 550.....	478
Atcheson v. Mallon.....	48 N. Y. 147.....	371
Atwater v. Trustees of Vil. of Canandaigua.....	124 N. Y. 603.....	552

B.		
Baily v. Hornthal.....	154 N. Y. 648, 661.....	502
Baird v. Baird.....	145 N. Y. 659, 664.....	6
Baker v. Oakwood.....	123 N. Y. 16.....	96
Bank of Commerce v. Union Bank..	3 N. Y. 230.....	283
Bank of Montreal v. Fidelity Nat. Bank.....	17 N. Y. S. R. 88; 112 N. Y. 667.....	319
Bank of Rome v. Village of Rome.....	19 N. Y. 20.....	224, 227
Barker v. People.....	3 Cow. 686.....	118
Barnes v. Brown.....	130 N. Y. 372.....	839
Barnes v. Seligman.....	55 Hun, 389, 349.....	839
Barrett v. Third Ave. R. R. Co....	45 N. Y. 628, 635.....	462
Bartlett v. Vinor.....	Carth. 252.....	546
Barto v. Himrod.....	8 N. Y. 483.....	113, 116
Bateson v. Gosling.....	L. R. (7 C. P.) 9.....	464
Batsford v. Kebbell.....	3 Ves. 363.....	458
Batterman v. Albright.....	122 N. Y. 484.....	296
Baulec v. N. Y. & H. R. R. Co....	59 N. Y. 356, 366.....	83
Beardsley v. Hotchkiss.....	96 N. Y. 201.....	454
Bell v. Merrifield.....	109 N. Y. 202.....	489
Beltz v. City of Yonkers.....	148 N. Y. 67.....	75, 77
Bemis's Webster Case.....	471.....	129
Bender v. Terwilliger.....	48 App. Div. 371.....	97

	PAGE.
Benjamin v. Elmira, J. & C. R. R. Co.	49 Barb. 441. 491
Benner v. Atlantic Dredging Co.	184 N. Y. 156 553
Benton v. Martin	52 N. Y. 570, 574 6
Benzing v. Steinway & Sons.	101 N. Y. 547, 553. 13, 472
Berger v. Duff.	4 Johns. Ch. R. 369. 429
Best v. Zeh.	83 Hun, 232; 146 N. Y. 863. 97, 100
Biglow v. Biglow.	39 App. Div. 103. 97
Birge v. Berlin Iron Bridge Co.	133 N. Y. 477. 239, 240
Bishop v. Grand Lodge E. O. of M. A.	112 N. Y. 627. 421
Bisson v. West Shore R. R. Co.	143 N. Y. 125 452
Blewitt v. Boorum.	142 N. Y. 357. 6
Bookstaver v. Jayne.	60 N. Y. 146. 6
Brady v. Mayor, etc., of N. Y.	20 N. Y. 312. 186
Brogan v. Hanan.	55 App. Div. 92 463
Brown v. Buffalo & S. L. R. R. Co.	22 N. Y. 191, 198. 545
Brown v. Mayor, etc., of N. Y.	63 N. Y. 239 186
Brownell v. Town of Greenwich.	114 N. Y. 518. 223, 227
Buel v. People	78 N. Y. 492. 127
Buffalo L., T. & S. D. Co. v. K. T. & M. M. A. Assn.	126 N. Y. 450. 376
Burch v. Newbury	10 N. Y. 374 383
Bush v. Bd. Suprs. Orange Co.	159 N. Y. 212. 57
Butler v. Penn.	10 How. (U. S.) 402. 110
Butler v. Townsend.	126 N. Y. 105, 110 15

C.

Cagwin v. Town of Hancock	84 N. Y. 532. 222, 223, 224
Capasso v. Woolfolk.	163 N. Y. 472. 17
Cary v. Western Union Tel. Co.	50 Abb. (N. C.) 337. 372
Chadsey v. Guion.	97 N. Y. 333. 23, 24
Chase v. Curtis.	113 U. S. 464. 388
Chautauqua Assembly v. Alling.	46 Hun, 582. 214
Chauvet v. Ives.	52 App. Div. 411; 62 App. Div. 339. 194
Chesebrough v. Conover.	140 N. Y. 382, 388. 372, 573
Christy v. Vest.	36 Iowa, 285. 443
Clark v. Cammann.	160 N. Y. 315. 452
Clark v. Eighth Ave. R. R. Co.	36 N. Y. 135. 570
Clason v. Baldwin.	129 N. Y. 183, 189. 42
Clemens v. Clemens.	37 N. Y. 59, 73. 487, 488
Clews v. Bank of N. Y. Nat. Banking Assn.	89 N. Y. 419. 281, 282
Cocking v. Fraser.	4 Douglas, 295. 21, 22, 24
Coddington v. Coddington.	10 Abb. Pr. 450. 508
Collender v. Dinsmore.	55 N. Y. 202. 98

TABLE OF CASES CITED.

XV

	PAGE.
Commercial Nat. Bank v. Taylor..	64 Hun, 499..... 463
Comrs. of Highways v. Judges of } Orange Co..... }	13 Wend. 433 228
Commonwealth v. Jacobs.....	91 Mass. 274..... 142
Commonwealth v. McDonald.....	5 Cushing, 365..... 184
Commonwealth v. McDonald.....	59 Mass. 365..... 142
Comstock v. Crawford.....	3 Wall. 396... .. 253
Conner v. Mayor, etc., of N. Y....	5 N. Y. 285..... 110
Continental Ins. Co. v. Ætna Ins. Co.	138 N. Y. 16, 21... .. 248
Coughlin v. N. Y. C. & H. R. R. } R. Co..... }	71 N. Y. 443. 497
Cox v. Mayor, etc., of N. Y.....	103 N. Y. 526. 62
Cox v. People.....	80 N. Y. 500, 517..... 141, 148
Cross v. Cross ..	108 N. Y. 628..... 508
Crown v. Orr.....	140 N. Y. 450. 473
Crumpton v. United States.....	138 U. S. 361, 364..... 358, 572, 637
Cunningham v. Fitzgerald.....	188 N. Y. 165..... 176
Currey v. Armitage.....	6 Weekly Repr. (Eng.) 516..... 464

D.

Dady v. O'Rourke.....	172 N. Y. 447..... 480
Dana v. Fiedler.....	12 N. Y. 40..... 89
Davis v. Supreme Lodge K. of H..	165 N. Y. 159..... 376
de Carricarti v. Blanco.....	121 N. Y. 230... .. 416, 417
Dederer v. Voorhies.....	81 N. Y. 153, 158..... 253
De Forest v. Jewett.....	88 N. Y. 264..... 473
Delafield v. Shipman ..	103 N. Y. 463, 467..... 450
Delafield v. Vil. of Westfield.....	41 App. Div. 24; 169 N. Y. 582. 417
Delaney v. McCormack.....	88 N. Y. 174, 183..... 450, 454
Delong v. Curtis.....	35 Hun, 94 463
Demarest v. Mayor, etc., of N. Y..	74 N. Y. 161..... 121
de Meli v. de Meli.....	120 N. Y. 485.. . . . 508
De Mott v. Hagerman.....	8 Cow. 220.... .. 295
Dennis v. First Nat. Bank of Seattle.	127 Cal. 453. 319
De Peyster v. Sun Mut. Ins. Co...	19 N. Y. 272..... 22
Dickinson v. City of Poughkeepsie.	75 N. Y. 65..... 187, 188
Dimon v. N. Y. C. & H. R. R. R. Co.	173 N. Y. 356, 358..... 572
Di Vito v. Crage.....	165 N. Y. 378..... 17
Doll v. Earle.....	59 N. Y. 638..... 61
Donnell v. Bennett.....	L. R. (22 Ch. Div.) 835..... 161
Dowd v. N. Y., Ont. & W. Ry. Co.	170 N. Y. 459..... 14
Dows v. McMichael.....	6 Paige, 140..... 491
Drake v. Drake.....	61 App. Div. 1..... 97
Driggs v. Phillips.....	103 N. Y. 77 559
Duck v. Mayeu.....	L. R. (2 Q. B. 1892) 511..... 463
Duryee v. Mayor, etc., of N. Y....	96 N. Y. 477 122

	E.	PAGE.
Eagle's Case.....	3 Abb. Pr. 218, 220.....	325
Eastland v. Clarke.....	165 N. Y. 420, 428.....	13, 15
Edgerton v. N. Y. & Harlem R. } R. Co.....	39 N. Y. 227.....	570
Ellerson v. Westcott.....	148 N. Y. 149.....	77, 101
Ellis v. Eason.....	50 Wis. 138.....	465
Ellis v. White.....	61 Ia. 644.....	588
Equitable G. L. Co. v. Baltimore } Coal, T. & Mfg. Co.....	65 Md. 73.....	161
Erkenbrach v. Erkenbrach.....	96 N. Y. 456.....	380, 392
	F.	
Ferguson v. Crawford.....	70 N. Y. 253.....	439
Finn v. Cassidy.....	165 N. Y. 584.....	14
Finnerty v. Prentice.....	8 N. Y. Wkly. Digest, 206; 75 N. Y. 615.....	534
First Nat. Bank of Ballston Spa } v. Bd. Suprs. Saratoga Co.....	106 N. Y. 488.....	62
First Nat. Bank of Kasson v. La } Due.....	39 Minn. 415.....	319
First Nat. Bank v. Lenk.....	32 N. Y. S. R. 191; 123 N. Y. 638.	339
First Nat. Bank v. Wallis.....	150 N. Y. 455.....	5
Fischer-Hansen v. Bklyn. H. R. } R. Co.....	173 N. Y. 492.....	634
Fitch v. Comrs. of Highways.....	22 Wend. 132.....	254
Fitzgerrold v. People.....	37 N. Y. 413.....	141
Flower v. Lance.....	59 N. Y. 603.....	62
Flynn v. Heard.....	118 N. Y. 26.....	62
Ford v. Knapp.....	102 N. Y. 135.....	98, 99
Fox v. Mohawk & H. R. Humane } Socy.....	165 N. Y. 517.....	210
Freeman Mfg. Co. v. Nat. Bank } of the Republic.....	160 Mass. 398.....	319
Frees v. Ford.....	6 N. Y. 176.....	252
Fries v. N. Y. & Harlem R. R. } Co.....	169 N. Y. 270 . 551, 554, 556, 557 558, 560, 561, 563, 564, 565, 642	
	G.	
Gale v. N. Y. C. & H. R. R. R. } Co.....	76 N. Y. 594.....	358
Garner v. Second Nat. Bank of } Providence.....	66 Fed. Repr. 369.....	319
Gates v. State of N. Y.....	128 N. Y. 221, 226.....	13
Gay v. Seibold.....	97 N. Y. 472.	547
Germania S. Bank v. Vil. of Sus- } pension Bridge.....	159 N. Y. 362.....	383

TABLE OF CASES CITED.

xvii

	PAGE.
Gibson v. Erie Railway Co.....	63 N. Y. 449..... 473
Gilbert v. York.....	111 N. Y. 544..... 252
Gildersleeve v. Landon	73 N. Y. 609..... 270
Gillet v. Bank of America.....	160 N. Y. 549..... 310
Gilman v. Tucker.....	128 N. Y. 190. 382
Ginna v. Second Ave. R. R. Co....	67 N. Y. 596..... 570, 577
Goddard v. Wilde.....	17 Fed. Repr. 845... 161
Goebel v. Wolf.....	113 N. Y. 405, 411..... 452
Goodrich v. McDonald.....	112 N. Y. 157, 163..... 499
Graham v. Manhattan Ry. Co.....	149 N. Y. 836..... 539, 570, 576
Grant v. Shurter.....	1 Wend. 148..... 389
Gray v. Central R. R. Co. of N. J.	137 N. Y. 483..... 417
Greenland v. Waddell.....	116 N. Y. 234, 244..... 452, 454
Griswold v. Sawyer.....	125 N. Y. 411..... 354
Gutta Percha & R. Mfg. Co. v. } Mayor, etc..... }	108 N. Y. 276..... 388

H.

Haight v. Littlefield.....	147 N. Y. 338..... 176
Harris v. Frink... ..	49 N. Y. 21, 27..... 295, 296
Hayden v. Stoughton.....	5 Pick. 528 41
Hemmens v. Nelson.....	138 N. Y. 517, 529 83
Henderson v. Henderson	3 Hare, 100..... 491
Hendrickson v. City of New York.	160 N. Y. 144..... 35, 37
Hewitt v. Northrup.....	75 N. Y. 506..... 508
Hickey v. Taaffe.....	105 N. Y. 26, 36..... 533
Higgins v. Ridgway	153 N. Y. 130..... 6
Hoffman v. Aetna F. Ins. Co.....	32 N. Y. 405..... 23
Holder v. Holder.....	40 App. Div. 255 97
Holmes v. Gilman	138 N. Y. 369..... 58
Hood v. Hood	85 N. Y. 561, 578..... 439
Hope v. People.....	83 N. Y. 423..... 403
Hover v. Barkhoof.....	44 N. Y. 113..... 537
Howard Ins. Co. v. Halsey.....	8 N. Y. 271, 273..... 49
Hubbell v. City of Yonkers.....	104 N. Y. 434..... 76
Huda v. American Glucose Co.....	154 N. Y. 474, 481.. 536, 540, 547, 548
Hull v. Littauer	162 N. Y. 569..... 83
Hunt v. Hunt.....	131 U. S. Appendix, 165..... 239
Hunter v. Hunter.....	111 Cal. 261..... 508

I.

Improvement Co. v. Munson	81 U. S. (14 Wall.) 442..... 83
In re Greene.....	166 N. Y. 485..... 394
Insurance Co. v. Fogarty	19 Wall. 640..... 22
Irvine v. Millbank... ..	{ 56 N. Y. 635; 15 Abb. Pr. (N. S.) 378..... 465

J.		PAGE.
Jackson ex dem. v. Cryslar	1 Johns. Cas. 125	42
Jacobs v. Morange.....	47 N. Y. 57.....	62
Jessup v. Hulse.....	21 N. Y. 168.....	289
Jordan v. Van Epps.....	85 N. Y. 427.....	491
Juilliard v. Chaffee.....	92 N. Y. 529, 534..	6

K.		
Kamp v. Kamp.....	59 N. Y. 212, 220.....	380, 392
Kane v. People.	8 Wend. 203.....	128
Kearsley v. Cole.....	16 M. & W. 136.....	464
Keefe v. People.....	40 N. Y. 348.....	141
Kennedy v. Manhattan Ry. Co.....	145 N. Y. 288.....	473
Kennedy v. People.....	39 N. Y. 245.....	141
Kent v. Quicksilver Mining Co....	78 N. Y. 159.....	213
Kettell v. Alliance Ins. Co.....	10 Gray, 144.....	22
King v. Chase.....	15 N. H. 13.....	489
King v. Paddock.....	18 Johns. 141, 143.....	325
Kinnier v. Kinnier.....	45 N. Y. 535.....	588
Kirby v. Taylor.....	6 Johns. Ch. 250, 253.....	465
Kirrigan v. Kirrigan	15 N. J. Eq. 146.....	508
Knisley v. Pratt.....	148 N. Y. 372.	534, 541
Knox v. Lee.....	12 Wall. 457.....	62
Knupfle v. Knickerbocker Ice Co..	84 N. Y. 488.....	539
Kramrath v. City of Albany.....	127 N. Y. 575.....	187, 190

L.		
Laidlaw v. Sage.....	158 N. Y. 73, 97.....	83
Lane v. King.....	8 Wend. 584.	296
Le Guen v. Gouverneur.....	1 Johns. Cas. 436.....	488
Lehr v. Steinway & H. P. R. R. Co.	118 N. Y. 556, 561.....	569, 575
Leighton v. People.....	89 N. Y. 117.....	513
Lent v. Tillson.....	140 U. S. 316, 328.....	230
Lewis v. N. Y. & Harlem R. R. Co. {	162 N. Y. 202.... 551, 552, 553, 559 564, 565, 642	
Link v. Sheldon.....	136 N. Y. 1, 5.....	358
Linkauf v. Lombard....	137 N. Y. 418	83
London Assurance v. Companhia { De Mongens.....	167 U. S. 149 .. .	23
Lord v. Atkins.....	138 N. Y. 184.....	176
Lorillard v. Clyde	122 N. Y. 47.....	491
Low v. Peers.....	Willmot's Notes, p. 373.....	368
Lyddy v. Long Island City.....	104 N. Y. 218.....	187, 189
Lyon v. Richmond.....	2 Johns. Ch. 60.....	61

TABLE OF CASES CITED.

xix

M.		PAGE.
McCarragher v. Rogers.....	120 N. Y. 526.....	538
McCrillis v. Hawes.....	38 Me. 566.....	464
McDermott v. People.....	5 Park. Cr. Rep. 104.....	142
McDonald v. Mayor, etc., of N. Y.	68 N. Y. 23.....	187
McGillis v. McGillis.....	154 N. Y. 582..	452
McGovern v. Central Vermont R. } R. Co.....	123 N. Y. 280.....	13, 472
McGrath v. N. Y. C. & H. R. R. Co.	63 N. Y. 522.....	539
McMahon v. N. Y. & Erie R. R. Co.	20 N. Y. 463.....	416
McRickard v. Flint.....	114 N. Y. 222.....	537, 539
Mackesey v. People.....	6 Park. Cr. Rep. 114.....	142
Maggrath v. Church.....	1 Caines' Cas. 195.....	22
Malloney v. Horan	49 N. Y. 111.....	487, 489
Maltbie v. Belden.....	167 N. Y. 807, 812.....	473
Manice v. Manice.....	43 N. Y. 303.....	454
Marine Nat. Bank v. National } City Bank.....	59 N. Y. 67.....	281, 282, 283
Masten v. Olcott.....	101 N. Y. 157.....	491
Matter of Baer.....	147 N. Y. 348, 354.....	452
Matter of Beehler.....	3 N. Y. S. R. 486, 488.....	252, 253
Matter of Breckenridge	160 N. Y. 103.....	528, 529, 530
Matter of Crane.....	164 N. Y. 71.....	450, 452
Matter of Davies.....	168 N. Y. 89.....	232
Matter of De Camp.....	151 N. Y. 557.....	229
Matter of Ellis' Estate	55 Hun, 401.....	508
Matter of Ensign	103 N. Y. 284.....	381
Matter of Hughes.....	95 N. Y. 55.....	442
Matter of Kimball	155 N. Y. 62.....	508
Matter of Morgan.....	99 N. Y. 145.....	291
Matter of Morrisson	52 Hun, 102; 117 N. Y. 638.	507, 508
Matter of N. Y. & Brooklyn Bridge.	72 N. Y. 527.....	108
Matter of N. Y. C. R. R. R. Co....	66 N. Y. 407.....	229
Matter of N. Y., West Shore & } Buffalo Ry. Co.....	35 Hun, 575.....	255
Matter of Palmer.....	40 N. Y. 561	394
Matter of Smith.....	131 N. Y. 239, 247.....	452
Matter of Stutzbach v. Coler.....	168 N. Y. 416.....	527, 528
Matter of Swales.....	60 App. Div. 599; 172 N. Y. 651.	506
		508
Matter of Underhill	117 N. Y. 471	291
Matter of Vil. of Middletown.....	82 N. Y. 196, 201.....	230
Matthews v. Chicopee Mfg. Co ...	3 Robt. 712.....	463
Maynard v. Hill.....	125 U. S. 190.....	389
Mayo v. India Mut. Ins. Co.....	152 Mass. 172.....	22
Meguire v. Corwine.....	101 U. S. 108.....	372

TABLE OF CASES CITED.

	PAGE.
Merrill v. Blanchard	7 App. Div. 167; 158 N. Y. 682.. 339
Merwin v. Manhattan Ry. Co.....	48 Hun, 608; 113 N. Y. 659. . . 569
Metropolitan Bd. of Excise v. } Barrie.....	34 N. Y. 657..... 111
Mickles v. Dillaye.....	17 N. Y. 86
Miller v. Fenton.....	11 Paige, 18..... 462
Mills v. Mills.....	40 N. Y. 546. 371
Miner v. Beekman	50 N. Y. 389..... 99
Missano v. Mayor, etc., of N. Y....	160 N. Y. 123..... 79
Mitchell v. Allen.....	25 Hun, 543..... 463
Mooney v. Byrne.....	163 N. Y. 87, 96..... 502
Moore v. Hegeman.....	92 N. Y. 521..... 509
Morgan v. Skiddy.....	62 N. Y. 319..... 416
Moulton v. Cornish.....	138 N. Y. 133, 143..... 345, 346
Muhlker v. N. Y. & Harlem R. R. Co.	173 N. Y. 549..... 643
Mulligan v. People.....	5 Park. Cr. Rep. 105..... 148
Murray v. N. Y. Life Ins. Co.....	96 N. Y. 614..... 127
Mygatt v. Wilcox.....	45 N. Y. 306..... 416

N.

National Bank of Commerce v. } Nat. Mechanics' Banking Assn. }	55 N. Y. 211..... 283
National Harrow Co. v. Bement } & Sons.....	163 N. Y. 505..... 413
Newhall v. Appleton.....	114 N. Y. 140..... 89
N. Y. L. Ins. & Trust Co. v. } Cuthbert.....	31 App. Div. 191; 160 N. Y. 705..... 194, 199
Nicholson v. Revill.....	4 A. & E. 675 (31 E. C. L. R.)... 464
Nolan v. Brooklyn City & N. R. } R. Co	87 N. Y. 63..... 570, 576
North v. Sergeant.....	33 Barb. 350, 354..... 462

O.

O'Brien v. Young.....	95 N. Y. 428..... 387
O'Connor v. Huggins.....	113 N. Y. 511..... 439
O'Dea v. O'Dea.....	101 N. Y. 23..... 508
O'Maley v. South Boston Gas L. } Co.....	158 Mass. 135..... 473
Oldfield v. N. Y. & H. R. R. R. Co.	14 N. Y. 310, 321..... 358
Oscanyan v. Arms Co.....	103 U. S. 261..... 372
Otten v. Manhattan Ry. Co.....	150 N. Y. 395, 401..... 179, 343

P.

Pacific Nat. Bank v. Mixer.....	124 U. S. 721..... 317, 319, 320
Palmer v. Ft. Plain & C. P. R. Co.	11 N. Y. 376 .. 41
Pantzar v. Tilly Foster Iron Min- } ing Co.....	99 N. Y. 368..... 13

TABLE OF CASES CITED.

xxi

	PAGE.
Parish v. N. Y. Produce Exchange. 169 N. Y. 84.....	213
Parkhurst v. Berdell.....	110 N. Y. 386..... 491
Parr v. Village of Greenbush.....	72 N. Y. 468 187, 188
Parrott v. Knickerbocker Ice Co ...	46 N. Y. 361..... 416
Patrick v. Shaffer.....	94 N. Y. 423, 430 487, 491
Patterson v. Ellis.....	11 Wend. 259..... 453
Pauley v. Steam G. & L. Co.....	131 N. Y. 90, 98..... 83, 536, 540
Payler v. Homersham.....	4 M. & S. 423 (80 E. C. L. R.)... 464
Peabody v. Norfolk.....	98 Mass. 452..... 161
Peabody v. Roberts.....	47 Barb. 91, 95..... 846
Peck v. Ellis.....	2 Johns. Ch. 181.... 463
People v. Brickner	8 N. Y. Cr. Rep. 217..... 399
People v. Briggs.....	60 How. Pr. 17..... 400
People v. Bush.....	4 Hill, 133..... 184
People v. Clark.....	8 N. Y. Cr. Rep. 169..... 399
People v. Conroy.....	97 N. Y. 62..... 141, 513
People v. Constantino.....	153 N. Y. 24..... 141
People v. Decker.....	157 N. Y. 186..... 514
People v. Dimick.....	107 N. Y. 15..... 401
People v. Giblin	115 N. Y. 196..... 141
People v. Hulbut.....	4 Denio, 133, 136 403
People v. Jarvis.....	19 App. Div. 466..... 211
People v. Johnson.....	110 N. Y. 134..... 128
People v. Lawton.....	56 Barb. 126..... 135, 142
People v. Majone.....	91 N. Y. 211... .. 513
People v. Meyer.....	162 N. Y. 357... .. 128, 141
People v. Molineux.....	27 Misc. Rep. 79. 399
People v. Montgomery.....	36 Misc. Rep. 328 399
People v. Moore.....	65 How. Pr. 177.... .. 399
People v. Moran.....	123 N. Y. 254.... 134, 135, 142, 148
People v. O'Connell.....	60 Hun, 109..... 136
People v. O'Connor.....	31 Misc. Rep. 668..... 399
People v. Osmond.....	138 N. Y. 80..... 141
People v. Petrea.....	92 N. Y. 143..... 400
People v. Phelps.....	61 Hun, 115.... .. 148
People v. Platt.....	117 N. Y. 159..... 118
People v. Purdy.....	154 N. Y. 439..... 118
People v. Restenblatt.....	1 Abb. Pr. 268. 400
People v. Rugg.....	98 N. Y. 537..... 128
People v. Rutherford.....	47 App. Div. 209 399
People v. Scannell.....	37 Misc. Rep. 345..... 399
People v. Stephens.....	71 N. Y. 559 62
People v. Stevens.....	13 Wend. 341..... 545
People v. Stites.....	75 Col. 570 148
People v. Sullivan.....	7 N. Y. 396..... 518
People v. Thomas	32 Misc. Rep. 170..... 399
People v. Van Zile.....	143 N. Y. 368..... 133

	PAGE.
People v. Vaughan	19 Misc. Rep. 298..... 399
People v. White	22 Wend. 176. 141
People v. Willett.....	102 N. Y. 251, 254..... 128, 141
People v. Willis.....	23 Misc. Rep. 568..... 399
People v. Wilson.. ..	145 N. Y. 628..... 147
People v. Winant.....	24 Misc. Rep. 361..... 399
People ex rel. Bolton v. Albertson.	55 N. Y. 50 114, 115
People ex rel. Burby v. Howland..	155 N. Y. 270..... 115
People ex rel. Chicago Junction, } etc., Co. v. Roberts	154 N. Y. 1. 261
People ex rel. Church of H. C. v. } Assessors.....	106 N. Y. 671..... 649
People ex rel. City of Rochester } v. Briggs	50 N. Y. 553..... 111, 113, 121
People ex rel. Coughlin v. Gleason.	121 N. Y. 631 187, 189
People ex rel. Dann v. Williams...	36 N. Y. 441..... 254
People ex rel. Decker v. Waters...	4 Misc. Rep. 1..... 232
People ex rel. Devery v. Coler....	173 N. Y. 103..... 392
People ex rel. Edison El. L. Co. } v. Campbell	138 N. Y. 548..... 260
People ex rel. Edison El. L. Co. } v. Wemple	148 N. Y. 690..... 261
People ex rel. Fowler v. Bull.....	46 N. Y. 57..... 117, 121
People ex rel. Howell v. Jessup...	160 N. Y. 249..... 86
People ex rel. Lackawanna Tr. } Co. v. Knight.....	75 App. Div. 164..... 261
People ex rel. McLean v. Flagg....	46 N. Y. 401 231
People ex rel. Manhattan Ry. Co. } v. Barker	152 N. Y. 417 649
People ex rel. Miller v. Wurster ...	149 N. Y. 549 649
People ex rel. N. Y. & E. R. } Ferry Co. v. Roberts.....	168 N. Y. 14..... 259
People ex rel. Ottman v. Comrs. } of Highways.....	27 Barb. 94; 30 N. Y. 470 254
People ex rel. Shaut v. Champion..	16 Johns. 61..... 229
People ex rel. Tyroler v. Warden, } etc.....	157 N. Y. 116..... 211
People ex rel. Washington Mills } Co. v. Roberts	8 App. Div. 201; 151 N. Y. 619.. 261
People ex rel. Williamson v. Mc- } Kinney	52 N. Y. 374 117, 118
People ex rel. Wood v. Draper ...	15 N. Y. 532 114, 115
Peri v. N. Y. C. & H. R. R. Co....	152 N. Y. 521..... 498
Perry v. Rogers	157 N. Y. 251..... 17
Pierson v. Thompson	1 Edw. Ch. 212, 218 462
Pitcher v. Lennon.....	12 App. Div. 356 537
Place v. Hayward	117 N. Y. 487 367

TABLE OF CASES CITED.

xxiii

	PAGE.
Planters' L. & S. Bank v. Berry ...	91 Ga. 264. 319
Plumb v. Tubbs	41 N. Y. 442. 42
Pollock v. Pollock	71 N. Y. 187, 153. 88
Pope v. Cole	55 N. Y. 124. 389
Post v. Pearsall	22 Wend. 425, 433. 163
Pray v. Hegeman	98 N. Y. 351. 491
Price v. Barker	4 Ell. & Bl. 760. 464
Prospect Park & C. I. R. R. Co. } v. C. I. & B. R. R. Co. }	144 N. Y. 152. 160
Putnam v. Ritchie	6 Paige, 890. 99

R.

Raabe v. Squier	148 N. Y. 81. 367
Radcliff's Exrs. v. Mayor, etc., of } Brooklyn	4 N. Y. 195. 556
Randall v. Sackett	77 N. Y. 480. 388
Rathbone v. Wirth	150 N. Y. 459. 114, 116, 118
Raymond v. Bell	18 Conn. 81. 253
Raynor v. Pacific Nat. Bank	93 N. Y. 371. 317, 320
Redmond v. Mayor, etc., of N. Y. ..	125 N. Y. 682. 62
Reed v. State	11 Tex. App. 509. 516
Reich v. Cochran	151 N. Y. 122, 128. 487, 491
Reining v. N. Y., Lack. & W. } Ry. Co. }	128 N. Y. 157. 555, 563
Remington Paper Co. v. O'Dough- } erty	32 Hun, 255; 96 N. Y. 666. 388
Rensselaer & Sar. R. R. Co. v. Davis.	43 N. Y. 137. 229
Rex v. Robinson	2 Burr. 800. 546
Reynolds v. Robinson	110 N. Y. 654. 6
Richardson v. Crandall	48 N. Y. 348. 371
Richardson v. Draper	87 N. Y. 337. 339
Richardson v. Thurber	104 N. Y. 606. 290
Robinson v. Nat. Bank of Newberne.	81 N. Y. 385, 392. 317
Robinson v. Oceanic Steam Nav. Co.	112 N. Y. 315, 323. 441
Rogers v. Common Council of } Buffalo	123 N. Y. 173. 118
Romaine v. Chauncey	129 N. Y. 566. 392
Rosenheim Real Estate Co. v. } Southern Nat. Bank. }	46 S. W. Repr. (Tenn.) 1026. 319
Round Lake Assn. v. Kellogg	141 N. Y. 348. 214
Rudd v. Cornell	171 N. Y. 114, 122. 452, 490
Russell v. Burton	66 Barb. 539. 372

S.

Safford v. First Nat. Bank of } Plattsburgh	61 Vt. 373. 319
Schmittler v. Simon	114 N. Y. 176. 6

	PAGE.
Scofield v. Hernandez.....	47 N. Y. 813..... 367
Sedgwick v. Stanton.....	14 N. Y. 289..... 372
Sexton v. Breese.....	135 N. Y. 387, 391..... 296
Sheehy v. City of New York.....	160 N. Y. 139..... 79
Sheldon v. Wright.....	5 N. Y. 497..... 253
Shepard v. Philbrick.....	2 Denio, 174..... 296
Sherman v. Foster.....	158 N. Y. 587, 596..... 49
Sherman v. Willett.....	42 N. Y. 146..... 296
Shipman v. Rollins.....	98 N. Y. 311..... 450
Shotwell v. Murray.....	1 Johns. Ch. 512..... 61
Sinnott v. German Am. Bank..	164 N. Y. 391..... 547
Sloan v. Baird.....	162 N. Y. 327..... 417
Sloan v. Herrick.....	49 Vt. 327..... 465
Smith v. City of Newburgh.....	77 N. Y. 130..... 187, 188
Smith v. Clews.....	114 N. Y. 190..... 89
Smith v. Edwards.....	88 N. Y. 92, 103..... 450
Smith v. Mayor, etc., of N. Y.....	10 N. Y. 504..... 186
Solly v. Forbes.....	2 Br. & B. 38 (6 E. C. L. R.)... 464
Spencer v. Merchant.....	125 U. S. 345..... 230
Spooner v. Brooklyn City R. R. } Co..... }	54 N. Y. 230..... 570
Sprague v. City of Rochester.....	159 N. Y. 20..... 79
Standard Fashion Co. v. Siegel- } Cooper Co..... }	157 N. Y. 60..... 160
Starin v. Town of Genoa.....	23 N. Y. 439..... 223
State of Illinois v. Delafield.....	8 Paige, 527..... 225
State of Louisiana v. Mayor of } New Orleans..... }	109 U. S. 285..... 382, 388
Stevens v. Adams.....	23 Wend. 57..... 495
Stewart v. Ferguson.....	164 N. Y. 553..... 536, 540, 544, 548
Stoffer v. State.....	15 Ohio St. 47..... 515
Stone v. Mississippi.....	101 U. S. 814..... 111
Stowell v. Chamberlain.....	60 N. Y. 276..... 491
Stowell v. Greenwich Ins. Co.....	163 N. Y. 298..... 89
Striker v. Kelly.....	7 Hill, 9..... 231
Stuyvesant v. Mayor, etc., of N. Y.	11 Paige, 414..... 41
Sullivan v. India Mfg. Co.....	113 Mass. 396..... 533
Sweeney v. Berlin & Jones Env. Co.	101 N. Y. 520..... 473

T.

Taylor v. Mayor, etc., of N. Y.....	67 N. Y. 87..... 416
Teed v. Morton.....	60 N. Y. 502, 506..... 452
Thomas v. Evans.....	105 N. Y. 601..... 99
Thomas v. Harmon.....	122 N. Y. 84..... 252
Thomas v. Scutt.....	127 N. Y. 133..... 89
Thompson v. Lack.....	3 Com. B. 540 (54 E. C. L. R.)... 464
Thorpe v. Amos.....	1 Sandf. Ch. 26, 34..... 462

TABLE OF CASES CITED.

XXV

	PAGE.
Thrasher v. Bentley.....	1 Abb. (N. C.) 89 289
Tool Co. v. Norris.....	2 Wall. 54.... 372
Town of Solon v. Williamsburgh } S. Bank	114 N. Y. 122..... 224
Town of Venice v. Woodruff.....	62 N. Y. 462. 223
Trist v. Child	21 Wall. 441..... 372
Trustees of Southampton v. Jessup.	162 N. Y. 123..... 87

U.

United States v. Coolidge.....	2 Gall. 364 400
United States v. Pirates.....	5 Wheaton, 201 129
Upington v. Corrigan	151 N. Y. 143..... 41

V.

Valentine v. Richardt.....	126 N. Y. 272..... 97
Vanderbeck v. City of Rochester..	122 N. Y. 289..... 62
Van Koughnet v. Dennie.....	68 Hun, 179..... 508
Van Rensselaer v. Jewett.....	2 N. Y. 135..... 416
Van Steenberg v. Bigelow	3 Wend. 42 254
Varnier v. Bevil.....	17 Ala. 286 443
Vartie v. Underwood.....	18 Barb. 561. 488
Village of Buffalo v. Webster	10 Wend. 100..... 210
Village of Ft. Edward v. Fish.....	156 N. Y. 363. 187, 190, 225
Village of Stamford v. Fisher.....	140 N. Y. 187. 210, 211

W.

Walker v. Walker.....	21 App. Div. 226 383
Walker v. Walker.....	155 N. Y. 77 380, 393
Wallace v. United States.....	162 U. S. 466..... 516
Wallerstein v. Columbian Ins. Co..	44 N. Y. 212..... 23
Walsh v. Mayor, etc., of N. Y.....	113 N. Y. 142..... 187, 189
Warner v. Durant.....	76 N. Y. 133, 136. 450, 453
Washburn & M. Mfg. Co. v. R. } M. Ins. Co.....	179 U. S. 1 22
Weed v. Weed	94 N. Y. 243..... 62
Wehle v. Haviland.....	42 How. Pr. 399, 410. 462
Weidman v. Sibley.....	16 App. Div. 616, 619..... 462
Wells v. Town of Salina.....	119 N. Y. 280..... 187, 189, 239
Weston v. Stoddard.....	137 N. Y. 119... 96, 97, 98, 100, 101 102
Wetmore v. Wetmore.....	162 N. Y. 503..... 379, 395
Wheeler v. Conn. Mut. L. Ins. Co..	82 N. Y. 543..... 54
Whitcomb v. Williams.....	4 Pick. 228..... 489
White v. Miller.....	78 N. Y. 393..... 416
Whittemore v. Judd L. & S. Oil Co.	124 N. Y. 565..... 465
Williams v. Brooklyn El. R. R. Co.	126 N. Y. 96, 108..... 635

	PAGE.
Williams v. Delaware, L. & W. } 116 N. Y. 628.....	473
R. R. Co.....	
Williams v. Williams.....	130 N. Y. 193..... 508
Willis v. Long Island R. R. Co.....	34 N. Y. 670, 683..... 569, 576
Willy v. Mulledy	78 N. Y. 310.. 535, 540, 544, 547, 548
Wood v. Erie Railway Co.....	72 N. Y. 196..... 547
Woodgate v. Fleet	64 N. Y. 566, 572..... 454

Z.

Ziegler v. Chapin.....	126 N. Y. 342..... 187, 190
------------------------	-----------------------------

TABLE OF CASES

AFFECTED BY DECISIONS REPORTED IN THIS VOLUME.

A F F I R M E D.	P A G E.
Adee v. Nassau Electric R. R. Co.	65 App. Div. 529. 580
Barker v. Higbie.	59 App. Div. 627. 584
Bertsch v. Metropolitan Street Ry. } Co.	68 App. Div. 228. 634
Birdsall v. Wheeler.	62 App. Div. 625. 590
Brereton v. Gilmore.	66 App. Div. 616. 592
Brintnall v. Rice.	63 App. Div. 54. 618
Buffalo Natural Gas Fuel Co. v. } Barber Asphalt Paving Co.	54 App. Div. 629. 594
Cammann v. Whittlesey.	70 App. Div. 598. 618
Card v. Moore.	68 App. Div. 327. 598
Carvalho v. Brooklyn & J. B. } Turnpike Co.	56 App. Div. 522. 586
Cattano v. Met. St. Ry. Co.	67 App. Div. 615. 585
Chauvet v. Ives.	62 App. Div. 339. 192
Cleveland v. Pomeroy.	71 App. Div. 620. 630
Colabel v. Metropolitan Street Ry. } Co.	74 App. Div. 505. 627
Coleman v. City of New York.	70 App. Div. 218. 612
Colonial Dames of America v. } Colonial Dames of the State of } New York.	63 App. Div. 615. 586
Colonial Dames of America v. } National Society of the Colonial } Dames of America.	63 App. Div. 615. 586
Continental Nat. Bank v. Trades- } men's Nat. Bank.	59 App. Div. 103. 272
Coombs v. City of Mt. Vernon.	64 App. Div. 620. 585
Cosgrove v. Metropolitan Street } Ry. Co.	74 App. Div. 166. 628
Cottle v. Cary.	73 App. Div. 54. 624
Cottle v. County of Erie.	57 App. Div. 443. 591
Cummer Lumber Co. v. Associ- } ated Mfrs. Ins. Co.	67 App. Div. 151. 633
D'Amato v. Gentile.	54 App. Div. 625. 596
Devitt v. Providence Washington } Ins. Co.	61 App. Div. 390. 17

	PAGE.
Dimon v. N. Y. C. & H. R. R. } R. Co.	74 App. Div. 626..... 356
Downs v. City of New York.....	75 App. Div. 423..... 651
Eagan v. Scully.....	29 App. Div. 617..... 581
Earle v. Earle.....	73 App. Div. 300..... 480
Edwards v. City of Mount Vernon.....	64 App. Div. 620..... 585
Flanagan v. N. Y. C. & H. R. R. } R. Co.	70 App. Div. 505..... 681
Fritz v. City Trust Co.....	72 App. Div. 532..... 622
Gilbert v. Finch.....	72 App. Div. 38..... 455
Griffith v. City of New York.....	73 App. Div. 549..... 612
Hasbrouck v. Eichorn.....	60 App. Div. 631..... 579
Hassard v. United States of Mexico.....	46 App. Div. 623..... 645
Haven v. Mayor, etc., of N. Y.....	67 App. Div. 90..... 611
Heath v. Koch.....	74 App. Div. 338..... 629
Helmer v. Morey.....	64 App. Div. 625..... 627
Hess v. Sloane.....	66 App. Div. 522..... 616
Hill v. Starin.....	65 App. Div. 361..... 632
Hopper v. Brown.....	67 App. Div. 620..... 613
Kennedy v. City of Watervliet.....	66 App. Div. 616..... 617
Janda v. Bohemian Roman Catho } lic Union.....	71 App. Div. 150..... 617
Livingston v. Livingston.....	74 App. Div. 261..... 377
Loneragan v. Erie R. R. Co.....	67 App. Div. 297..... 616
McCarty v. Albany County Bank.....	51 App. Div. 619..... 583
McKee Land & Improvement Co. } v. Williams.....	63 App. Div. 553..... 680
Marchesi v. Bell Telephone Co. of } Buffalo.....	73 App. Div. 620..... 628
Marino v. Lehniaier.....	62 App. Div. 43..... 530
Matter of Akers.....	74 App. Div. 461..... 620
Matter of Baker.....	59 App. Div. 625..... 249
Matter of Chase.....	70 App. Div. 623..... 615
Matter of City of Rochester v. } Bloss.....	77 App. Div. 28..... 646
Matter of Cullinan.....	76 App. Div. 362..... 610
Matter of Morrison v. Cantor.....	75 App. Div. 480..... 646
Matter of Schenectady Ry. Co.....	67 App. Div. 628..... 603
Matter of Sheldon.....	72 App. Div. 625..... 287
Matter of Stewart.....	77 App. Div. 633..... 608
Newburgh Sav. Bank v. Town } of Woodbury.....	64 App. Div. 305..... 55
New England Water Works Co. } v. Farmers' L. & T. Co.....	65 App. Div. 610..... 584
N. Y. & N. H. Sprinkler Co. v. } Andrews.....	62 App. Div. 8..... 25

TABLE OF CASES AFFECTED.

xxix

	PAGE.
N. Y. & Rosendale Cement Co. v. Keator.....	62 App. Div. 577. 285
Nolan v. Metropolitan St. Ry. Co..	65 App. Div. 184. 604
Norsworthy v. Troy & New England Ry. Co.....	66 App. Div. 616. 585
Olpherts v. Smith.	54 App. Div. 514. 598
Parker v. Beer.....	65 App. Div. 598. 832
Pearsall v. Westcott.	57 App. Div. 380. 579
People v. Bootman.....	72 App. Div. 619, 620. 622
People v. Burns	78 App. Div. 611. 598
People v. Filippelli.....	Court of General Sessions, County of New York, Feb. 21, 1901. 509
People v. Glen.....	64 App. Div. 187. 395
People v. Niagara Fruit Co.....	75 App. Div. 11. 629
People v. Sullivan.....	Supreme Court, Schoharie County, Oct. 25, 1901. 122
People v. Vandervoort.....	57 App. Div. 635. 594
People v. Wise	68 App. Div. 650. 613
People ex rel. Abell v. Coler.....	72 App. Div. 615. 589
People ex rel. Clifford v. Scannell.	74 App. Div. 406. 606
People ex rel. Devery v. Coler.....	71 App. Div. 584. 103
People ex rel. Devery v. Coler.....	72 App. Div. 615. 587
People ex rel. Devery v. Knox.....	72 App. Div. 615. 589
People ex rel. Devery v. Murphy..	72 App. Div. 615. 588
People ex rel. Hart v. York.....	73 App. Div. 445. 610
People ex rel. J. B. Lyon Co. v. McDonough.....	76 App. Div. 257. 181
People ex rel. Murphy v. Bd. of Education.....	76 App. Div. 620. 607
People ex rel. Rutherford v. Stewart.....	78 App. Div. 648. 651
People ex rel. Sands v. Feltner....	76 App. Div. 620. 647
People ex rel. Sheridan v. Adams..	76 App. Div. 619. 611
People ex rel. Stevenson Co. v. Lyman.....	69 App. Div. 406. 604
People ex rel. Stevenson Co. v. Lyman	67 App. Div. 446. 605
People ex rel. Tupper Lake W. Co. v. Sisson.....	75 App. Div. 188. 606
Petrie v. Miller.....	57 App. Div. 17. 596
Phelan v. Downs.....	59 App. Div. 282. 619
Potts v. Baldwin.....	67 App. Div. 434. 385
Prentice v. Fargo.....	58 App. Div. 608. 598
Quade v. Bertsch.....	65 App. Div. 600. 615
Ralley v. O'Connor.....	71 App. Div. 828. 621
Riggs v. Carter.....	77 App. Div. 580. 632
Roberts v. Cohen	60 App. Div. 259. 580

		PAGE.
Robinson v. Appleby.	69 App. Div. 509.....	626
Rogers v. City of New York.....	71 App. Div. 618.....	623
Rosa v. Volkening.....	64 App. Div. 426.....	590
Rowley v. Feldman.....	74 App. Div. 492.....	607
Schlereth v. Schlereth.....	73 App. Div. 283.....	444
Seletskey v. Third Avenue R. R. Co.	69 App. Div. 27.....	645
Shilagi v. Degnon-McLean Con- } tracting Co.	71 App. Div. 152.....	625
Slade v. Boutin.....	63 App. Div. 537.....	592
Smith v. Ruggiero.....	52 App. Div. 382.....	614
Stedwell v. Hartmann.....	74 App. Div. 126.....	624
Stewart v. Phelps.....	71 App. Div. 91.....	621
Sweezy v. Legg.	39 App. Div. 655.....	597
Taylor v. Taylor..	63 App. Div. 231.....	266
Town of Goshen v. Smith.....	61 App. Div. 461.....	597
Trustees of Union College v. City } of New York.....	65 App. Div. 553.....	38
United States Trust Co. v. Wheeler.	73 App. Div. 289.....	631
Van Reed v. People's Nat. Bank...	67 App. Div. 75.....	314
Veazey v. Allen.....	61 App. Div. 119.....	359
Warth v. Mertens.....	71 App. Div. 395.....	626
Wild v. Porter.....	59 App. Div. 350.....	614

REVERSED.

Banta v. Merchant.....	45 App. Div. 141.....	292
Beglin v. Met. Life Ins. Co.	57 App. Div. 629.....	374
Birrell v. N. Y. & Harlem R. R. Co.	60 App. Div. 630.....	644
Breed v. Ruoff.	71 App. Div. 621.....	340
Citizens' Sav. Bank v. Town of } Greenburgh.....	60 App. Div. 225.....	215
Conkling v. Weatherwax.....	66 App. Div. 617.....	42
Crawford v. Nassoy.....	55 App. Div. 433.....	163
Drake v. Auburn City Ry. Co.....	70 App. Div. 622.....	466
Farmers' Feed Co. v. Scottish } Union & Nat. Ins. Co.....	65 App. Div. 70.....	241
Fenwick v. Mitchell.....	64 App. Div. 621.....	633
Fischer-Hansen v. Brooklyn } Heights R. R. Co.....	63 App. Div. 356.....	492
Gates v. Dudgeon.....	72 App. Div. 562.....	426
Hamilton v. City of Buffalo.....	55 App. Div. 423.....	72
Hoes v. N. Y., N. H. & H. R. R. Co.	73 App. Div. 363.....	435
Johnson v. N. Y. C. & H. R. R. } R. Co.....	66 App. Div. 617.....	79
Keirns v. N. Y. & Harlem R. R. Co.	60 App. Div. 630.....	642
Maloney v. Iroquois Brewing Co...	63 App. Div. 454.....	303
Megowan v. Peterson.....	61 App. Div. 622.....	1

TABLE OF CASES AFFECTED.

xxxi

	PAGE.
Muhlker v. N. Y. & Harlem R. R. } Co.....	60 App. Div. 621 549
O'Keeffe v. City of New York....	73 App. Div. 312 474
People v. Lichtman.....	65 App. Div. 76 63
People v. Prillen.....	73 App. Div. 207 67
People ex rel. Chappel v. Lindenthal.	79 App. Div. 43 524
People ex rel. Decker v. McCue....	74 App. Div. 40 347
People ex rel. Town of Walton v. } Bd. of Suprs.....	75 App. Div. 184 297
Pfeifer v. Sup. Lodge of Bohe- } main S. B. Society.....	74 App. Div. 630 ... 418
Pinder v. Brooklyn Heights R. } R. Co.....	65 App. Div. 521 519
Riddle v. Forty-second St., M. & } St. N. A. Ry. Co.....	72 App. Div. 619 327
St. Regis Paper Co. v. Santa Clara } Lumber Co.....	66 App. Div. 617..... 149
Satterlee v. Kobbe.....	66 App. Div. 306.... 91
Schwan v. City of New York.....	65 App. Div. 420..... 32
Siegel v. N. Y. & Harlem R. R. Co.	62 App. Div. 290..... 644
Simone v. Kirk.....	57 App. Div. 461.... 7
Starbuck v. Starbuck.....	63 App. Div. 437..... 503
Sweeney v. City of New York.....	69 App. Div. 80. 414
Thousand Island Park Association } v. Tucker.....	59 App. Div. 627..... 203
Wilcox v. Equitable Life Assur. } Society.....	55 App. Div. 529... 50

MODIFIED.

Fortunato v. Mayor, etc., of New } York.....	74 App. Div. 441..... 608
Leonard v. Harney.....	63 App. Div. 294. 352
Matteson v. Palser.....	56 App. Div. 91..... 404
People ex rel. N. Y. C. & H. R. } R. R. Co. v. Knight.....	75 App. Div. 169..... 255
Trustees of Southampton v. Jessup.	64 App. Div. 525..... 84

APPEAL DISMISSED.

Barnum v. Hooker..	76 App. Div. 622 639
Bindrim v. Ullrich.....	64 App. Div. 444..... 587
Evans v. Muller.....	74 App. Div. 630..... 601
Favo v. Remington Arms Co.....	67 App. Div. 414..... 600
Hurley v. Brown.....	54 App. Div. 619.. 595
India W. Brewing Co. v. Bklyn. } Wharf & W. Co.....	59 App. Div. 83..... 167
Kelly v. Moore.....	74 App. Div. 626..... 647

	PAGE.
Matter of Arkenburgh.....	69 App. Div. 618..... 638
Matter of Bissell.....	57 App. Div. 61..... 595
Matter of Boerum Street.....	74 App. Div. 632..... 821
Matter of Daly.....	72 App. Div. 394..... 640
Matter of Davenport.....	74 App. Div. 624..... 600
Matter of Dwight.....	61 App. Div. 357..... 583
O'Sullivan v. Flynn.....	67 App. Div. 516..... 619
People v. Bremer.....	66 App. Div. 14..... 599
People ex rel. Myer v. Adam.....	74 App. Div. 604..... 582
Schieck v. Donohue.....	77 App. Div. 321..... 638
Smith v. Wilcox.....	64 App. Div. 618..... 581
Southgate v. Continental Trust Co. 74 App. Div. 150.....	602

MOTION TO DISMISS APPEAL DENIED.

American Press Association v. } Brantingham..... }	75 App. Div. 435..... 601
Burns v. Mullin.....	42 App. Div. 116..... 609
Greenwald v. Wales.....	67 App. Div. 628.. 637
Schuyler v. N. Y. C. & H. R. R. R. } Co..... }	68 App. Div. 650..... 603
Werner v. Hearst.....	76 App. Div. 375..... 641

APPEAL WITHDRAWN.

Feierstein v. Supreme Lodge K. } of H. }	69 App. Div. 53..... 639
--	--------------------------

TABLE OF CASES

DISTINGUISHED, ETC., IN OPINIONS REPORTED IN THIS VOLUME.

	PAGE.
Bank of Rome v. Village of Rome	19 N. Y. 20, explained 224
Bell v. Merrifield	109 N. Y. 202, approved 489
Brady v. Mayor, etc., of N. Y.	20 N. Y. 312, distinguished 187
Brown v. Mayor, etc., of N. Y.	63 N. Y. 239, distinguished 187
Brownell v. Town of Greenwich	114 N. Y. 518, explained 223
Butler v. Townsend	126 N. Y. 105, distinguished 15
Cagwin v. Town of Hancock	84 N. Y. 532, distinguished 222
Cary v. Western Union Tel. Co.	20 Abb. (N. C.) 337, distinguished 372
Chautauqua Assembly v. Alling	46 Hun, 582, distinguished 214
Chesebrough v. Conover	140 N. Y. 382, distinguished 372
Cunningham v. Fitzgerald	138 N. Y. 165, distinguished 176
Dady v. O'Rourke	172 N. Y. 447, followed 480
DeLafield v. Village of Westfield	41 App. Div. 24; 169 N. Y. 582, distinguished 417
Dickinson v. City of Pough- keepsie	75 N. Y. 65, distinguished 188
Fitch v. Comrs. of Highways	22 Wend. 132, distinguished 254
Gray v. Central R. R. Co. of N. J.	157 N. Y. 483, distinguished 417
Greenland v. Waddell	116 N. Y. 234, approved 454
Griswold v. Sawyer	125 N. Y. 411, distinguished 354
Haight v. Littlefield	147 N. Y. 338, distinguished 176
Hendrickson v. City of New York	160 N. Y. 144, distinguished 35
Knisley v. Pratt	148 N. Y. 372, distinguished 534
Kramrath v. City of Albany	127 N. Y. 575, distinguished 190
Lord v. Atkins	138 N. Y. 184, distinguished 176
Lyddy v. Long Island City	104 N. Y. 218, distinguished 189
McDonald v. Mayor, etc., of N. Y.	68 N. Y. 23, distinguished 187
Malloney v. Horan	49 N. Y. 111, followed 489
Parr v. Village of Greenbush	72 N. Y. 463, distinguished 188
People ex rel. Coughlin v. Gleason	121 N. Y. 631, distinguished 189
People ex rel. Dann v. Williams	36 N. Y. 441, distinguished 254
People ex rel. Ottman v. Comrs. of Highways	27 Barb. 94; 30 N. Y. 470, distinguished 254
Round Lake Assn. v. Kellogg	141 N. Y. 348, distinguished 214
Russell v. Burton	66 Barb. 539, distinguished 372
Sedgwick v. Stanton	14 N. Y. 289, distinguished 372
Sloan v. Baird	162 N. Y. 327, distinguished 417
Smith v. City of Newburgh	77 N. Y. 130, distinguished 188

xxxiv TABLE OF CASES DISTINGUISHED.

	PAGE.
Smith v. Mayor, etc., of N. Y.	10 N. Y. 504, distinguished. 187
Starin v. Town of Genoa	23 N. Y. 439, distinguished. 223
Town of Solon v. Williamsburgh } S. Bank }	114 N. Y. 122, explained 224
Town of Venice v. Woodruff	62 N. Y. 462, distinguished. 223
Village of Ft. Edward v. Fish	156 N. Y. 363, distinguished. 190, 225
Walsh v. Mayor, etc., of N. Y.	113 N. Y. 142, distinguished. 189
Wells v. Town of Salina	119 N. Y. 280, distinguished. 189
Weston v. Stoddard	137 N. Y. 119, approved 96
Ziegler v. Chapin	126 N. Y. 342, distinguished. 190

CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING DECEMBER 9, 1902.

JAMES MEGOWAN et al., Appellants, v. CHARLES G. PETERSON,
Respondent.

BILLS, NOTES AND CHECKS — WHEN MAKER OF NOTE, SIGNED BY HIM AS "TRUSTEE," IS NOT PERSONALLY LIABLE — NEGOTIABLE INSTRUMENTS LAW (L. 1897, CH. 612, § 39) — QUESTION OF FACT. A trustee of an insolvent firm, for the benefit of creditors thereof, appointed by such firm and its creditors, is not personally liable under the provisions of the Negotiable Instruments Law (L. 1897, ch. 612, § 39), upon a note signed by him as "trustee," but without disclosing his representative character upon the face of the note, where the payee is one of such creditors and the consideration for which the note was given was property purchased from the payee for the benefit of the trust estate; but where in an action upon the note, brought by the payee, against the maker, the evidence is conflicting as to whether the property, for which the note was given, was purchased for the benefit of the trust estate and whether the plaintiff agreed to accept the note of defendant in his representative capacity, the direction of a verdict in favor of the defendant is reversible error.

Megowan v. Peterson, 61 App. Div. 622, reversed.

(Argued November 19, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 7, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Franklin Pierce for appellants. The defendant Peterson was a trustee for the creditors of Johnson & Peterson, and not an agent for creditors, and he had no authority to make and sign promissory notes which in any way bound the trust estate or the assets of the trust estate. (*Rowe v. Rand*, 111 Ind. 206; *Taylor v. Mayo*, 110 U. S. 330; *Schmittler v. Simon*, 114 N. Y. 187; *Neresheimer v. Smith*, 167 N. Y. 202; *Mann v. Whitbeck*, 17 Barb. 388; *Van Dine v. Willett*, 38 Barb. 319; *Pitte v. Jameson*, 15 Barb. 310; *Newton v. Poole*, 12 Leigh, 112; *Robinson v. C. Nat. Bank*, 86 N. Y. 404; *Perkins v. Boothby*, 71 Me. 91.) As trustee the defendant Peterson could not by his executory contract, although made in the interest and for the benefit of the estate which he represented, bind the assets so as to exempt himself from the payment of this promissory note personally, and no defense whatever is set up in the answer. (*O'Brien v. Jackson*, 167 N. Y. 31; *Taylor v. Mayo*, 110 U. S. 330; *D., L. & W. R. R. Co. v. Gilbert*, 44 Hun, 201; 112 N. Y. 673; *New v. Nichols*, 73 N. Y. 127; *Jenkins v. Phillips*, 41 App. Div. 389; *Mulrein v. Smillie*, 25 App. Div. 135, 138; *Wetmore v. Porter*, 92 N. Y. 76; *Vilas v. Paget*, 106 N. Y. 439; *Ryan v. Rand*, 20 Abb. [N. C.] 313; *Rogers v. Wendell*, 54 Hun, 540.)

James P. Philip and *J. Stewart Ross* for respondent. There was no question of fact for the jury. (*Brady v. Cassidy*, 104 N. Y. 155; *O'Neil v. James*, 43 N. Y. 92; *Dwight v. G. L. Ins. Co.*, 103 N. Y. 341; *Linkhauf v. Lombard*, 137 N. Y. 417; *Hemmens v. Nelson*, 138 N. Y. 517.) Defendant never became personally liable to plaintiffs, and never personally owed plaintiffs the debt. (*F. Nat. Bank v. Wallis*, 150 N. Y. 455; *Whitford v. Laidler*, 94 N. Y. 145; *Olpherts v. Smith*, 54 App. Div. 514; *Higgins v. Ridgway*, 153 N. Y. 130.) It was competent and proper to prove the conditions annexed to the note. (*Ewing v. Wightman*, 167 N. Y. 112; *Rogers v. Smith*, 47 N. Y. 324; *Benton v. Martin*, 52 N. Y. 570; *Schmittler v. Simon*, 114 N. Y. 176.)

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

HAIGHT, J. This action was brought to recover of the defendant personally the amount of a promissory note, of which the following is a copy :

"\$693.19.

BROOKLYN, Dec. 28, 1899.

"Three months after date I promise to pay to the order of C. Stevens Co. six hundred and ninety-three 19/100 dollars at Kings County Bank of Bklyn, value received. Due March 28, 1900. CHARLES G. PETERSON, *Trustee*."

The plaintiffs were copartners doing business under the firm name of C. Stevens Co., and upon the trial, to establish their cause of action, introduced the note in question in evidence, the signature being admitted, and then rested. The defendant, in order to establish his defense, then introduced in evidence testimony tending to show that on the 4th day of December, 1899, the surviving member of the firm of Johnson & Peterson called a meeting of the creditors of the firm, and at such meeting the creditors assembled executed a paper by which "we, the undersigned creditors of Johnson & Peterson, hereby agree to and with each other and for the purpose of liquidating the business of Johnson & Peterson and the completion of the contracts of said firm, do hereby appoint Charles G. Peterson as sole agent and trustee for the benefit of all creditors to assume control and management of said business, hereby ratifying each and every act said agent in the premises by him done or to be done. And we severally agree to forbear the prosecution and collection of our respective claims against said firm." Then followed the signatures of the creditors, among which is that of the plaintiffs' firm, "C. Stevens Co." This was followed by another paper of the same character, upon which appear the signatures of other creditors who were not present at the meeting. Thereupon and at the same meeting another paper was drawn and executed by Johnson, the surviving member of the firm, by which, in consideration of one dollar, the receipt of which he admitted, he bargained and sold, granted and conveyed unto Charles G. Peterson, as trustee for the creditors of Johnson

& Peterson, his successors and assigns, all the stock in trade, goods, merchandise, effects and property of every description belonging to or owned by the said partnership of Johnson & Peterson wherever the same may be, together with all debts, choses in action and sums of money due and owing to said firm. He then produced oral testimony tending to show that he entered upon the discharge of his duties as such trustee and undertook the completion of certain buildings which Johnson & Peterson had contracted to construct, and for that purpose purchased lumber of these plaintiffs under the express agreement that they would accept in payment therefor his promissory note as such trustee and that the note in suit was given in payment for such lumber. This latter testimony was controverted by the plaintiffs, who testified that they did not know the purpose for which the lumber was purchased, and did not agree with him to accept his note as trustee for the benefit of the creditors in payment therefor. At the conclusion of the evidence the court, upon application of the defendant's counsel, dismissed the complaint upon the ground that no cause of action had been established against the defendant, the plaintiffs asking for leave to go to the jury upon the controverted fact as to whether the plaintiffs gave credit to the defendant in his representative capacity or as an individual. An exception was taken by the plaintiffs to the direction of a verdict by the court.

The Negotiable Instruments Law (L. 1897, ch. 612, section 39) provides as follows: "Where the instrument contains, or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." In this case, as we have seen, the defendant signed the note and then added to his signature the word "trustee." He did not, in the instrument itself, disclose the fact that he was trustee for the creditors of Johnson & Peterson, so that, under the

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

provisions of this statute, he would become personally liable upon the note unless he could show that at the time of the delivery of the note to the plaintiffs he disclosed the fact that the consideration for which the note was given was for the benefit of the creditors of Johnson & Peterson, and that he gave the note as the trustee for such creditors.

It is contended on behalf of the plaintiffs that his representative character must be disclosed upon the face of the note. This may be so in so far as innocent purchasers for value are concerned, but as to the payees named in the note we think a different rule prevails. In the case of *First National Bank v. Wallis* (150 N. Y. 455) the action was upon a promissory note signed by Wallis, who added to his signature "president," and by Smith, who added to his signature "treasurer." They were in fact president and treasurer of the Wallis Iron Works, a corporation, and the note was issued as an obligation for the corporation, and was discounted by the plaintiff bank. It was held that the plaintiff was entitled to recover upon the ground that the representative characters of the defendants were not disclosed to the bank at the time that it discounted the paper. ANDREWS, Chief Judge, in delivering the opinion of the court, said with reference thereto: "It may be admitted that if the bank, when it discounted the paper, was informed or knew that the note was issued by the corporation, and was intended to create only a corporate liability, it could not be enforced against the defendants as individuals, who, by mistake, had executed it in such form as to make it on its face their own note, and not that of the corporation. But according to the rules governing commercial paper nothing short of notice, express or implied, brought home to the bank at the time of the discount, that the note was issued as the note of the corporation, and was not intended to bind the defendants, could defeat its remedy against the parties actually liable thereon as promisors." We do not understand that the statute to which we have alluded was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties and those

having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown. (*Benton v. Martin*, 52 N. Y. 570, 574; *Bookstaver v. Jayne*, 60 N. Y. 146; *Juilliard v. Chaffee*, 92 N. Y. 529, 534; *Reynolds v. Robinson*, 110 N. Y. 654; *Baird v. Baird*, 145 N. Y. 659, 664; *Blewitt v. Boorum*, 142 N. Y. 357; *Schmittler v. Simon*, 114 N. Y. 176; *Higgins v. Ridgway*, 153 N. Y. 130.)

It is further contended on behalf of the plaintiffs that they are now entitled to judgment, for the reason that the answer does not allege all of the facts necessary to constitute a defense. The case, however, was not tried upon that theory, and the plaintiffs did not upon the trial ask for any direction of a verdict. If the answer of the defendant is defective the question should have been raised in the trial court, where an opportunity to amend might have been given if it was found wanting in any material allegation.

The trial court appears to have been of the opinion that the plaintiffs, by signing the paper selecting the defendant to liquidate the business of Johnson & Peterson, constituted him their agent and that, therefore, he could not be held personally liable. We think this paper must be read in connection with that executed by Johnson, and reading the two together the intent of the parties is made reasonably clear. Johnson, the surviving member of the firm of Johnson & Peterson, called a meeting of the creditors and gave them the privilege of selecting the person who should take charge of the assets of the firm, carry on the business so far as it was necessary to close up existing contracts, and then distribute the property. The creditors selected the defendant and then Johnson conveyed all the property of the firm to him as trustee for the creditors, thereby vesting the title to the property in him as such trustee. We think, therefore, that, notwithstanding the fact that the word "agent" is used in the paper signed by the creditors, under the latter instrument the defendant became a trustee for the creditors and that it was in such character that he took possession

N. Y. Rep.]

Statement of case.

of the property and undertook the liquidation of the assigned estate.

The evidence submitted on behalf of the defendant, tending to show that the lumber for which the note was given was purchased for the benefit of the assigned estate and that the plaintiffs agreed to accept his note in his representative capacity therefor, having been controverted by the testimony of the plaintiffs, a question of fact arose which it became necessary for the trial court to submit to the jury. It was, therefore, error to refuse the plaintiffs' request to go to the jury upon this question of fact and to direct a verdict in favor of the defendant.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ., concur.

Judgment reversed, etc.

ROSE SIMONE, as Administratrix of ANGELO SIMONE, Deceased,
Appellant, v. WILLIAM B. KIRK et al., Respondents.

NEGLECT — LIABILITY OF MASTER WHEN SAFE PLACE TO WORK IN BECOMES UNSAFE — WHEN FOREMAN IS NOT A FELLOW-SERVANT. Where, upon the trial of an action to recover damages for the death of a laborer alleged to have been caused by the negligence of his employers, it appears that, at the time of the accident which caused his death, the defendants were contractors engaged in excavating material for railroad ballast from a large bank composed of ashes and cinders in which solid lumps of lime paste, unfit for ballast, were occasionally found and were removed either by loosening them from the top and prying them off, or by undermining them and causing them to fall down, and when partially undermined became unsafe and liable to fall at any time — that such work was in charge of a competent foreman, who was authorized to hire men and set them at work, discharge them and direct the work — that the decedent was hired by the foreman several weeks after the commencement of the work and assigned to duty with the night gang, with which he worked one night and part of the next, shoveling loose ashes and cinders into cars, until he reached a point some distance from the place where he began to work and where he had never been before — that in a dark place, dimly lighted by a distant lamp, a heavy mass of lime paste, partially undermined and cracked at the top.

projected several feet from the bank and was eight or ten feet from the ground beneath it, in which condition it had been left by the day gang three days before, with no support under it and with nothing to give warning of the danger, all of which was known to the foreman, who was familiar with the situation — that when this place was reached the decedent was ordered by the foreman, without any warning of the dangerous situation, to get a pick and go under the projection and loosen material for the next load; that decedent, having no knowledge of the danger, went to work under the projection as directed, and while so engaged was crushed to death by the fall thereof.

Held, that the defendants were liable; that it was their duty to inspect the progress of the work with such care and diligence as the nature of the materials and the danger of the work required, and when any place became dangerous, because any of such lumps of lime paste became undermined and, therefore, liable to fall, to give warning of such danger to their servants having no knowledge thereof and required to work at such place; that although the defendants had the right to delegate and intrust the conduct of such duty to a competent foreman, they could not do so without being liable for the manner in which it was performed, and whoever in fact performed or attempted to perform such duty stood for the defendants as their *alter ego*, and what he did had the same effect in law as if they had done it in person;

Also *held*, that the fact that, as to some of his duties, the foreman was a fellow-servant of decedent at the time of his injury and death did not relieve the defendants from liability, since, in hiring decedent and setting him at work, the foreman was not discharging a servant's, but a master's duty, and decedent did not become a fellow-servant of the foreman until the latter had hired him and set him at work, and it was at this time, when the relation of master and servant first began, that the law required due diligence on the part of the defendants to furnish a safe place for decedent to work; a sufficient period of time having elapsed between the day when the dangerous situation arose and the day when decedent was put to work at the dangerous place to enable the defendants by careful inspection to discover the danger, they were chargeable with knowledge thereof, independent of the knowledge of the foreman.

Simone v. Kirk, 57 App. Div. 481, reversed.

(Argued November 20, 1902; decided December 9, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 18, 1901, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial.

This action was brought to recover damages alleged to have been caused by the negligence of the defendants resulting in

N. Y. Rep.]

Points of counsel.

the death of the plaintiff's intestate. At the trial the jury rendered a verdict for the plaintiff, but the judgment entered thereon was reversed by the Appellate Division. The order of reversal stated that it was founded upon questions of law only, "the court having examined the facts and found no error therein."

The facts, so far as material, are stated in the opinion.

W. J. McClusky and *S. E. McClusky* for appellant. The defendants were guilty of negligence, in that they failed to furnish, in the first instance, a reasonably safe place for plaintiff's intestate to perform his duties while in their employment. (*Eastland v. Clarke*, 165 N. Y. 420; *Finn v. Cassidy*, 165 N. Y. 584; *Pantzar v. T. F. I. M. Co.*, 99 N. Y. 368; *McGovern v. C. V. R. R. Co.*, 123 N. Y. 280; *Kranz v. L. I. R. R. Co.*, 123 N. Y. 1; *Span v. Ely*, 8 Hun, 258; *Buckley v. P. H. I. O. Co.*, 17 N. Y. S. R. 438; 117 N. Y. 645; *Felice v. N. Y. C. & H. R. R. R. Co.*, 14 App. Div. 345; *Stuber v. McEntee*, 142 N. Y. 200; *Berry v. A. S. Co.*, 64 N. Y. Supp. 292.) The defendants were guilty of negligence in adopting an improper method in removing the cinders and ashes from the bank, and in their failure to have properly inspected the bank at the place where plaintiff's intestate was injured. (*McCarthy v. Washburn*, 42 App. Div. 252; *Doing v. N. Y., O. & W. Ry. Co.*, 151 N. Y. 579; *Davidson v. Cornell*, 132 N. Y. 232.) The plaintiff's intestate was free from contributory negligence, and that question was properly submitted to the jury. (*Stuber v. McEntee*, 142 N. Y. 204; *Johnson v. H. R. R. Co.*, 20 N. Y. 65; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 464; *Kain v. Smith*, 89 N. Y. 375; *Wallace v. C. V. R. R. Co.*, 138 N. Y. 302.)

Jerome L. Cheney for respondents. The submission to the jury of the question of negligence on the part of the defendants on the ground of failure to furnish a safe place to work was error. (*Perry v. Rogers*, 157 N. Y. 251; 91 Hun, 243; *Capasso v. Woolfolk*, 163 N. Y. 473; *Di Vito v. Crage*, 165 N. Y. 379; *Loughlin v. State of N. Y.*, 105 N. Y. 159;

Cullen v. Norton, 126 N. Y. 1; *Hussey v. Coger*, 112 N. Y. 614; *Oregan v. Marston*, 126 N. Y. 568; *Quigley v. Levering*, 167 N. Y. 58; *Miller v. Thomas*, 15 App. Div. 105.) The contention of appellant that the excavation at the place where the accident occurred was actually completed before the intestate was employed is untrue in fact, being not only unsupported by the evidence, but contrary to the evidence; and the conclusion of law sought to be derived therefrom is unsound and untenable. (*Butler v. Townsend*, 126 N. Y. 105; *McCone v. Gallagher*, 16 App. Div. 272; *Murphy v. B. A. R. R. Co.*, 88 N. Y. 146; *Wilson v. Merry*, L. R. [1 Sc. App.] 326; *Haley v. Keim*, 151 Penn. St. 117; *Burns v. Sennett*, 99 Cal. 363.) Appellant's contention that defendants were negligent in adopting an improper method of work in this case is not well taken either in point of law or of fact. (*McCarthy v. Washburn*, 42 App. Div. 252; *Doing v. N. Y., O. & W. R. R. Co.*, 151 N. Y. 579; *O'Sullivan v. Flynn*, 67 App. Div. 516; *Klupp v. United Ice Lines*, 39 N. Y. S. R. 782; *Kehler v. Schwenk*, 144 Penn. St. 348; *Sisco v. L. V. Co.*, 145 N. Y. 296; *Davidson v. Cornell*, 132 N. Y. 228; *Doomer v. D. & H. C. Co.*, 171 Penn. St. 581.) The court erred in submitting to the jury the question whether the deceased assumed the risk of the danger resulting in his injury. (*Kinsley v. Pratt*, 148 N. Y. 372; *Crown v. Orr*, 140 N. Y. 450.)

VANN, J. In the spring of 1899 the defendants were engaged in removing ashes and cinders from the "Solvay Dump," so called, and using the same to ballast a railroad which they were constructing between the city of Syracuse and the village of Baldwinsville. The "Solvay Dump" was a great bank of refuse material composed chiefly of loose ashes and cinders which were fit for ballast, and masses of lime paste which was not fit for that use. The pile on its northerly side extended between 300 and 350 feet in an easterly and westerly direction, and it was from 15 to 25 feet in height. The lime paste was in solid lumps, irregular in shape

and varying in size, which were found occasionally in the bank of refuse and were removed either by loosening them from the top and prying them off, or by undermining them from the bottom and causing them to fall down. No use was made of them, but when they were dislodged they were put one side so as to be out of the way. The work was in charge of a competent foreman, who was authorized to hire the men, set them at work, discharge them and direct how the work should be done. Two sets of men, one in the daytime and the other at night, were employed to shovel the ashes and cinders into cars which ran upon temporary tracks near the foot of the bank.

Angelo Simone, the plaintiff's intestate, was hired by the foreman several weeks after the commencement of the work, and was assigned to duty with the night gang. He worked one night at the westerly end of the bank shoveling the loose ashes and cinders into the cars. The next night he continued to work as a shoveler until about three o'clock in the morning, when the gang, working toward the east along the north side of the bank, had reached a point about 200 feet from the place where he was first set at work. At this point there was a solid mass of lime paste several feet thick, triangular in shape, the base about ten feet in width embedded in the bank, and the sides about eight feet long ending in a point three feet wide. This heavy mass, which was cracked on the top, projected four feet from the bank, and was eight or ten feet above the surface of the ground. It had been left in this condition, as the jury might have found, by the day gang three days before, with no support under it and nothing to warn of the danger, as the foreman knew. Simone had never been in that place before. He had received no warning as to the dangerous situation at that point, or as to the danger liable to arise at any point from the huge chunks of lime paste scattered through the bank of refuse. It was dark when he reached the point in question. The locality was dimly lighted, the nearest light being 200 feet away and he neither knew nor was he chargeable with knowledge of the danger.

The foreman was familiar with the situation, but when warned of similar dangers before he made light of them, saying, "it is nothing." As the workmen reached this place the foreman told Simone to "get a pick and go under there and pick so we can have some stuff ready for the next load." Simone, believing and having the right to believe that the place was safe, laid down his shovel, walked back for a pick and went to work under the projection as directed. In two or three minutes it fell upon him and crushed him to death.

While there was a conflict of evidence, the jury could have found the facts as stated, and it is presumed from their general verdict that they did so. They were instructed by the trial judge that the defendants were bound to use reasonable care to furnish a safe place for the plaintiff's intestate to work in, and that if they did not furnish such a place as a reasonably careful and prudent man would have furnished under the same circumstances, they were liable to the plaintiff in damages, provided the projection had remained where it was long enough to give the master notice of its condition, and provided also that the intestate was himself free from negligence and had not assumed the risk of the danger he encountered. The jury found for the plaintiff, but the Appellate Division reversed upon the ground that, as the pile of refuse was reasonably safe in the first instance and became unsafe owing to the manner in which the details of the work were performed under the direction of the foreman, the defendants were not guilty of actionable negligence.

As the learned Appellate Division approved of the facts as found and reversed upon questions of law only, their order of reversal cannot stand unless some error of law was committed by the trial court. While the legal principles governing the subject are well settled, the difficulty of applying those principles to the facts before us is so great as to lead to a difference of opinion between the members of the court. A majority of my associates are in favor of reversing the order appealed from and by their direction I will endeavor to briefly state our reasons for reaching this conclusion.

The defendants were carrying on a lawful business and, with certain limitations, they had the right to intrust the conduct thereof to a competent foreman. If they intrusted to his care all things relating to the business, as to some of those things he was a mere servant doing a servant's work, but as to others he was a master doing a master's work. A servant's work, as such, can be delegated to a competent foreman and if other servants are injured through his negligence in doing that work the master is not liable, because the negligence of a fellow-servant is not the negligence of the master. A master's work, as such, however, cannot be delegated so as to free him from liability, because the work that the law says is for him to do must be done with due care or he is liable for the consequences, whether he does it himself or through another. If he deutes the duty to a foreman and it is carefully done, he is safe, but if it is negligently done, the law holds him liable for the damages naturally resulting, even if the foreman was fully competent.

It is the duty of a master in employing servants to use reasonable care to provide them with proper appliances and a safe place to work, and this duty is so firmly fastened upon him by law that he cannot delegate it without liability for the negligence of the one to whom he intrusts it. The duty of using reasonable care in inspecting the place where servants are set at work is also the master's duty which he must properly discharge at his peril, either personally or through another. Certain work is inherently dangerous, and yet the master has the right to hire servants to do it. In such cases, however, unless the danger is obvious to an ordinary observer, it is his duty to give them due warning, so that they may refuse to work if they do not wish to run the risk, and proper instructions so that if they enter upon the work they may be able to take care of themselves. (*Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368; *Benzing v. Steinway & Sons*, 101 N. Y. 547; *McGovern v. Central Vermont R. R. Co.*, 123 N. Y. 280; *Gates v. State of N. Y.*, 128 N. Y. 221, 226; *Eastland v. Clarke*, 165 N. Y. 420, 428; *Finn v. Cas-*

sidy, 165 N. Y. 584; *Dowd v. N. Y., Ont. & W. Ry. Co.*, 170 N. Y. 459.)

There is no complaint in this action as to want of care on the part of the defendants in furnishing suitable appliances for their servants to work with. The crucial question is whether the defendants used due diligence to furnish a safe place, in so inspecting it as to keep it reasonably safe and in properly warning the plaintiff's intestate. These duties were for the defendants to discharge as masters, and they could not delegate them even to a competent foreman without being responsible for the manner in which they were performed. Whoever in fact performed or attempted to perform them, stood for the defendants as their *alter ego*, and what he did had the same effect in law as if they had done it in person. The place furnished for the plaintiff's intestate to work in was not safe, yet he was not warned, and, ignorant of the danger, obeyed orders and met his death. It was unsafe when they set him at work and they knew it, or should have known it.

It is, however, claimed that the place was safe when the work was commenced and that it became unsafe as the work progressed, owing to the method of doing it. That the inert mass of refuse was safe until disturbed is doubtless true, but as soon as it was interfered with, owing to the nature of the materials of which it was composed, it was liable to become unsafe at any point and at any time. The duty of inspection should have been discharged in the light of this fact, for inspection must be reasonable, and, hence, adapted to the circumstances, not only as to thoroughness but as to frequency. If this accident had happened on the first day that the defendants began to remove the refuse a different question would have been presented from the one now before us. The work, however, had progressed for several weeks before Simone was employed, and proper inspection, as the jury might have found, would have disclosed that the place where the men worked was frequently unsafe, and that the point where Simone was killed had been unsafe for at least three days. When a new servant was hired by the defendants new duties were cast

upon them with reference to him, for they were bound to furnish him a safe place to work when they set him at work. In hiring Simone and setting him at work the foreman was not discharging a servant's duty but a master's, and when he set him at work on the west end of the pile he knew of the danger existing at the east end, but he did not protect the place by supports, nor cause it to be well lighted, nor warn him, nor take any precaution required by the situation. He was not a fellow-servant of Simone when the danger was created, for the latter was not then a servant of the defendants, and he did not become a fellow-servant until after the foreman had hired him and set him at work. (*Eastland v. Clarke, supra.*) As to Simone, at least, it was not enough that the place was safe some weeks before when other men were hired and put at work there, for reasonable care was due from the defendants to provide a safe place for the new servant to work in and to warn him of the danger he was liable to encounter. When the relation of master and servant first began between the defendants and Simone was the time when the law required due diligence on their part to furnish him a safe place to work.

This is not like the case assumed for the purpose of argument in *Butler v. Townsend* (126 N. Y. 105, 110), where one set of workmen built the scaffold and another set used it, but all were engaged in a common employment for the same master during the period both of construction and user. In the case before us, when the dangerous situation was created the plaintiff's intestate was not the servant of the defendants, and, hence, not a fellow-servant of the foreman.

A sufficient period of time had elapsed between the day when the dangerous situation arose and the day when Simone was injured to enable the masters, by careful inspection, to discover the facts, and careless inspection would not relieve them of liability. Independent of the knowledge of the foreman, therefore, as the jury might have found, the defendants knew or were charged with knowledge of this dangerous projection. Can a man, hired with such knowledge and set

at work on that pile, be said to have been furnished with a safe place in which to work? As to Simone, it was the same as if the work had been abandoned months before and a new set of men employed, himself among them, on the day he began to work. Even if as to the servants employed when the work was first commenced, weeks before the accident, the rule is as was held below, as to Simone who was employed after the danger arose and after the defendants knew of it, that rule is not applicable, because as to him it was the same as if the business had commenced on the day that he was first employed. He had the right to a reasonably safe place, in view of all the circumstances, and to assume that the place furnished was reasonably safe when he began to work, or else due warning should have been given so that he could protect himself or refuse to work. This was not done, and yet this was the work of the defendants, as masters, which the law does not permit them to delegate to a foreman, unless the latter does it without negligence. When the foreman employed Simone and set him at work on that pile without warning, it was the same in legal effect as if one of the defendants in person had done it knowing of the danger as it then existed.

We have examined the cases relied upon by the respondents, but we find none which, when carefully studied, sustain by the decision actually made, as contrasted with unnecessary expressions in some of the opinions, the position taken by the Appellate Division. In those chiefly relied upon, the servant, with full knowledge of the danger, was engaged in the work of making a safe place for himself and his fellow-workmen, and the master had the right to assign him to that duty. We think the case was properly submitted to the jury, and that it was for them to pass upon the questions relating to the negligence of the defendants, the contributory negligence of the plaintiff's intestate and the claim that he assumed the risk of the danger which caused his death. We find no exception which authorized a reversal by the court below, and we, therefore, reverse their order and affirm the judgment rendered by the trial court, with costs.

PARKER, Ch. J., and GRAY and WERNER, JJ. (dissenting), say: When this case was before the Appellate Division that court unanimously reached the conclusion that observance of the rule of *stare decisis* required a reversal of the judgment. *Perry v. Rogers* (157 N. Y. 251); *Capasso v. Woolfolk* (163 N. Y. 472); *Di Vito v. Crage* (165 N. Y. 378) were some of the cases that seemed to it to compel the decision made. A re-examination of these familiar cases persuades us that both in their letter and spirit they did support and command the judgment reached.

Therefore we vote to affirm the judgment.

BARTLETT, HAIGHT and MARTIN, JJ., concur with VANN, J.; PARKER, Ch. J., GRAY and WERNER, JJ., dissent in memorandum.

Order reversed, etc. _____

JOHN J. DEVITT, Respondent, v. PROVIDENCE WASHINGTON
INSURANCE COMPANY, Appellant.

1. MARINE INSURANCE — CONSTRUCTIVE TOTAL LOSS. Under a policy of marine insurance, providing, *first*, "The said loss or damage to be estimated according to the true and actual cash value of the said property at the place of destination on the day of the disaster; * * * but fruit and vegetables, and other articles perishable in their own nature, are free of particular average," and, *second*, "It is understood that there can be no abandonment of the subject insured; nor shall the acts of the insurers or their agents in recovering, saving or disposing of the property hereby insured, be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party," where the property insured, consisting of a cargo of fruit and vegetables, was shipped in a canal boat which was sunk and part of the cargo was recovered in a damaged condition, shipped to the insured and sold by him, the amount realized being but slightly in excess of the handling and selling charges and was less than the sum expended by the insurer in raising and shipping the cargo, not including therein the expenses of the sale, the latter is liable for a constructive loss on the whole of the articles insured.

2. WHEN ABANDONMENT NOT NECESSARY TO CONSTITUTE A CONSTRUCTIVE LOSS. The fact that the policy provides that "there can be no abandonment of the subject insured" does not prevent a constructive total loss,

since that provision is found in connection with the further provision, "nor shall the acts of the insurers or their agents in recovering, saving or disposing of the property hereby insured be considered a waiver or an acceptance of abandonment," the effect of which is to prevent the action of the insurer in taking possession of the property and interfering to save it from being held as the acceptance of an abandonment.

Devitt v. Providence Washington Ins. Co., 61 App. Div. 390, affirmed.

(Argued October 17, 1902; decided December 9, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

La Roy S. Gove and *James J. Macklin* for appellant. The plaintiff's suit is obviously and plainly a claim for damages for injury to his cargo. (2 Pars. on Mar. Ins. 378; *Wadsworth v. P. Ins. Co.*, 4 Wend. 35; *Ins. Co. v. Bland*, 9 Dana, 147; *Burt v. B. & M. Ins. Co.*, 9 Hun, 383; *Brooke v. Ins. Co.*, 5 Mart. [N. S.] 546.) Policies of insurance in general use except from all loss that is not total certain articles, such as fruit and vegetables, which are especially liable to damage. (*Woodside v. C. Ins. Office*, 84 Fed. Rep. 283; *Wadsworth v. P. Ins. Co.*, 4 Wend. 39.) Even if plaintiff's claim were not a claim for indemnity for partial loss and damage, but if it were a claim to recover for a constructive total loss, it would be utterly unwarranted in law. (*Skinner v. W. M. & F. Ins. Co.*, 19 La. 273; 2 Pars. on Mar. Law, 337; 2 Arnould on Ins. 911; *Adams v. McKenzie*, 32 L. J. [C. P.] 92; *Hubbell v. G. W. Ins. Co.*, 74 N. Y. 252; *Burt v. B. & M. Ins. Co.*, 9 Hun, 387; *Ins. Co. of N. A. v. C. S. R. Co.*, 87 Fed. Rep. 493; *M. S. S. Co. v. M. Ins. Co.*, 19 J. & S. 455; 2 Phill. on Ins. § 1867; *Brooks v. L. Ins. Co.*, 4 Mart. [N. S.] 640, 681; *Murray v. Hatch*, 6 Mass. 465; *G. W. Ins. Co. v. Fogarty*, 19 Wall. 640; *Neilson v. C. Ins.*

N. Y. Rep.]

Points of counsel.

Co., 3 Caines, 108; 2 Pars. on Mar. Law, 381; *Hugg v. Ins. Co.*, 7 How. 595.)

Ralph Earl Prime, Jr., for respondent. The policy in suit should receive the strictest construction against the defendant, and effect given to clauses exempting it from liability only where the case most clearly falls within the exception. (*L. Assur. Co. v. Compagnia De Moagens de Barriere*, 167 U. S. 149; *Rolker v. G. W. Ins. Co.*, 4 Abb. Ct. App. Dec. 76; *Herman v. M. Ins. Co.*, 81 N. Y. 184, 186; *Allen v. St. L. Ins. Co.*, 85 N. Y. 473; *Kratzenstein v. W. Ins. Co.*, 116 N. Y. 54; *Rickerson v. H. Ins. Co.*, 149 N. Y. 303; Richards on Ins. 262, § 236; *Heebner v. E. Ins. Co.*, 10 Gray, 131; *Mayo v. I. M. Ins. Co.*, 152 Mass. 172; *Adams v. Mackenzie*, 13 C. B. [N. S.] 422.) The plaintiff's loss in the case at bar was a constructive total loss, and for such a loss he is entitled to recover under the policy in suit. (Richards on Ins. 114, § 107; *Ins. Co. v. C. S. R. Co.*, 87 Fed. Rep. 491; *Irving v. Manning*, 1 H. L. Cas. 304; *Rodaconolli v. Elliott*, 3 Asp. 399; *Aranzamendi v. L. Ins. Co.*, 2 La. 332; *Rosetto v. Gurney*, 11 C. B. 196; *Reynolds v. O. Ins. Co.*, 22 Pick. 191.) In the case at bar the question of abandonment does not enter, nor under the policy was it a necessary condition of plaintiff's right to recover as for a constructive total loss. (*Chadsey v. Guion*, 97 N. Y. 339; *Ins. Co. v. C. S. R. Co.*, 87 Fed. Rep. 491; *McCall v. Ins. Co.*, 66 N. Y. 505; *Schuyler v. Ins. Co.*, 134 N. Y. 345; *Rankin v. Potter*, L. R. [6 H. L.] 83; *Holbrook v. U. S.*, 21 Ct. of Claims [U. S.], 434; *Babbitt v. S. M. Ins. Co.*, 23 La. Ann. 314; *Fosdick v. N. Ins. Co.*, 3 Day [Conn.], 108; *Walker v. P. Ins. Co.*, 29 Misc. Rep. 317.) The facts of the case at bar authorize a recovery as for a constructive total loss. (*Wallerstein v. C. Ins. Co.*, 44 N. Y. 204; *De Peyster v. Ins. Co.*, 19 N. Y. 272; *Carr v. Ins. Co.*, 109 N. Y. 504; *Chadsey v. Guion*, 97 N. Y. 333; *Corbett v. S. G. Ins. Co.*, 155 N. Y. 389; *Bryan v. N. Y. Ins. Co.*, 25 Wend. 617; *Poole v. P. Ins. Co.*,

14 Conn. 47; *Todor v. N. E. Ins. Co.*, 12 Cush. 556; *Heebner v. E. Ins. Co.*, 10 Gray, 131; *Mayo v. I. M. Ins. Co.*, 152 Mass. 172; *Greene v. Ins. Co.*, 9 Allen, 217; *Snow v. Ins. Co.*, 119 Mass. 592.) Plaintiff's loss in the case at bar was a total loss within the meaning of the policy issued by defendant, independent of the general principles of marine insurance. (*Moss v. Smith*, 9 C. B. Rep. 94; *Marcardier v. Ins. Co.*, 8 Cranch, 39; *Aranzamendi v. Ins. Co.*, 2 La. 432; Phillips on Ins. [5th ed.] § 1769; *Chadsey v. Guion*, 14 J. & S. 118.)

CULLEN, J. The action is brought on a policy of marine insurance effected on a cargo of apples, potatoes and other vegetables shipped on a canal boat. The boat was sunk by an obstruction in the Erie canal. Part of the cargo was recovered, though in a damaged condition, and reshipped to the plaintiff. This portion was sold. The amount realized on the sale was but slightly in excess of the handling and selling charges and was less than the sums expended by the defendant in raising and shipping the cargo, not including therein the expenses of the sale. The trial court found that there was a constructive total loss of the property insured. The judgment entered upon the decision in the trial court was unanimously affirmed by the Appellate Division. No exceptions were taken to the rulings of the court in the admission or rejection of evidence. In this state of the record the only question presented to us is whether, under the policy, the defendants were liable for constructive total loss.

The material clauses of the policy under which the controversy arises are, *first*, "The said loss or damage to be estimated according to the true and actual cash value of the said property at the place of destination on the day of the disaster; * * * *But fruit and vegetables, and other articles perishable in their own nature, are free of particular average,*" and *second*, "It is understood that there can be no abandonment of the subject insured; nor shall the acts of the insurers or their agents in recovering, saving or disposing of the prop-

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

erty hereby insured, be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party." The first provision is generally found in marine policies, though in different forms, and is of quite remote origin. It is known both in the text books and in judicial opinions as the "memorandum." (2 Arnould on Marine Ins. § 993; 1 Parsons on Marine Ins. 627.) The reason which dictated this provision is said to be that there are many articles of a perishable nature with regard to which it is very difficult to discover how far their deterioration is owing to the perils of the sea against which the insurance is effected, and how far to their own inherent decay or decomposition. There is no dispute that free from particular average exempts the insurer from liability for partial damage or for anything less than a total loss. All the authorities agree in this. In marine insurance total losses are of two characters, actual and constructive. This seems to be the law in all commercial countries, though the rule differs in different countries as to what damage is sufficient to create a constructive total loss. In England the damage must be so great that when repaired the value of the restored ship or article is not worth the cost of repair. In this country the rule is that where the repairs will exceed fifty per cent or one-half of the value of the ship or articles insured when repaired or restored it is a constructive total loss. The issue between the parties is whether insurance against total loss is confined to *actual* total loss or whether it includes as well *constructive* total loss. In England, though at one time a contrary doctrine was asserted by Lord MANSFIELD (*Cocking v. Fraser*, 4 Douglas, 295), the law seems settled that such insurance indemnifies against constructive as well as against actual total loss, and the rule applies to memorandum articles as well as to other insured property. (Arnould on Marine Ins. sec. 902; *Adams v. McKenzie*, 32 L. J. C. P. 92.) In this country the authorities are conflicting, and possibly the weight of authority is the other way. Kent says

(3 Com. 295) that to charge the insurer the memorandum articles must be physically destroyed so as not to exist in specie. This was in accord with the decision made by him while in the Supreme Court of this state in *Maggrath v. Church* (1 Caine's Cases, 195), which was decided on the authority of *Cocking v. Fraser* (*supra*). This doctrine has been modified in the United States Supreme Court so that a total loss in value is deemed to render the insurer liable the same as a total physical loss (*Ins. Co. v. Fogarty*, 19 Wall. 640), but subject to that qualification seems to be strictly adhered to. The latest case on the subject in that court is *Washburn & Moen Mfg. Co. v. R. M. Ins. Co.* (179 U. S. 1) where most of the earlier cases are reviewed. It is, however, to be observed that in that case the rider was "Free of particular average, but liable for *absolute* total loss of a part if amounting to five (5) per cent." The court held that the memorandum and rider were to be construed together and so construed exempted the insurer from any liability except in case of absolute (*i. e.*, actual) total loss. Therefore, the question before us was not necessarily involved in the *Washburn* case, though it may be conceded that the discussion of the opinion covers it. On the other hand, in Massachusetts a contrary view of the subject has been taken by the courts. In *Kettell v. Alliance Ins. Co.* (10 Gray, 144) the policy contained a clause "partial loss on * * * tin plates is excepted." The tin plates were damaged more than half their value. This was held to be a constructive total loss which rendered the insurer liable. In *Mayo v. India Mutual Ins. Co.* (152 Mass. 172) the clause in the policy was "Free of partial loss." It was held that the insurer was liable for a constructive total loss, the property having been damaged more than fifty per cent in value.

The first inroad in this state on the doctrine of Chancellor KENT was made in *De Peyster v. Sun Mutual Ins. Co.* (19 N. Y. 272), where it was held that perishable articles included in a memorandum clause are to be deemed totally lost though existing in specie when they have been so injured by the perils as to be incapable of transportation to the port of destination.

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

The next was in *Wallerstein v. Columbian Insurance Co.* (44 N. Y. 212), where it was held that, after a vessel was exposed to the peril of a total loss and abandoned, the recovery, at great expense to the underwriter, of a small portion of the cargo, consisting of memorandum articles, did not convert into a partial loss what would have been otherwise a total loss. In *Chadsey v. Guion* (97 N. Y. 333) the insurance was on a quantity of potatoes shipped in a canal boat, and the memorandum declared that vegetables and certain other articles "Are warranted by the assured free from average unless general." The boat with its cargo arrived safely at its port of destination and a quantity of potatoes was delivered to the consignee in good order and sold by him. Thereafter the boat with the remainder of the cargo was sunk. This court held, through RUGER, Ch. J., that the contract exempted "The assured from the payment of any loss, whether total to that part or otherwise, occurring to a portion only of the cargo, and confined their liability to the absolute or constructive loss of the entire cargo," and that the preservation of the material part of the cargo in specie and in good order was an answer to the claim for total loss. While it may be said that since the court decided the insurer was not liable for the loss the dictum quoted from the opinion was obiter, still we think it declares the proper interpretation to be given to the memorandum clause. It is a cardinal rule in the interpretation of insurance policies that doubtful expressions should be construed most favorably to the insured. (*Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; *London Assurance v. Companhia De Moagens*, 167 U. S. 149; *May on Ins.* sec. 175.) The use of the term "total loss" in two different senses, one as referring to an actual total loss and the other to a constructive total loss, is a practice that has long obtained in commerce as well as in text books and judicial decisions. Mr. Parsons says (Vol. 2, p. 68): "Total loss of maritime property under insurance is either actual (or, as it is sometimes called, absolute) or constructive. * * *" As an original proposition it is difficult to see why, under the rule of construction stated, the term when used

in an insurance policy should not include both kinds of loss, or why the same rule should not apply to the construction of the memorandum as to the other parts of the policy. Of course, if by long and uniform custom insurance against total loss had been accepted by persons interested in effecting or granting insurance as confined to actual total loss, that is the construction which should be given to the policy. But the acceptance of this construction has not been uniform. In England, where it was first declared by Lord MANSFIELD, it was very shortly thereafter repudiated by his successors, Lords KENYON and ELLENBOROUGH, and has never since obtained. In Massachusetts it has not been accepted, and even in those jurisdictions which profess to still follow the decision in *Cocking v. Fraser* (*supra*), it has been found necessary to relax the rigorous doctrine of Lord MANSFIELD. If the underwriters wish to limit their liability to actual total loss, it is very easy to say so instead of using terms of different signification in different jurisdictions. Much as we hesitate to place our view of the law even in apparent opposition to that of the Supreme Court of the United States, we feel constrained to adhere to the doctrine in *Chadsey v. Guion* (*supra*), that for a constructive loss on the whole of the articles insured the underwriter is liable.

It is contended by the learned counsel for the appellant that as the policy provides that there can be no abandonment of the subject insured, there can be no such thing as a constructive total loss. If the policy contained a provision standing by itself that "the insured shall not have the privilege of abandonment," his position might be correct. Ordinarily to constitute a constructive loss, it is necessary that there should be an abandonment. "A constructive total loss in insurance law, is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment." (Arnould on Marine Ins. sec. 1091.) But in this policy the provision that there can be no abandonment of the subject insured, is found in connection with the further provision, "nor shall the acts of the insurers or their agents

N. Y. Rep.]

Statement of case.

in recovering, saving or disposing of the property hereby insured, be considered a waiver or an acceptance of abandonment." Construed with the text of the whole provision, we think that the only effect of this clause is to prevent the action of the underwriters in taking possession of the property and interfering to save it from being held as the acceptance of an abandonment.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN and WERNER, JJ., concur.

Judgment affirmed.

THE NEW YORK AND NEW HAVEN AUTOMATIC SPRINKLER COMPANY, Respondent, v. JAMES F. ANDREWS, Appellant.

CONTRACT — WORK DONE THEREUNDER TO BE PAID FOR "AFTER CERTIFICATE OF APPROVAL SHOULD HAVE BEEN ISSUED BY THE NEW YORK BOARD OF FIRE UNDERWRITERS" — RECOVERY MAY BE HAD WHEN ISSUANCE OF CERTIFICATE PREVENTED BY DEFAULT OF OWNER. Where it appeared, in an action brought to recover the price agreed to be paid for work done under a contract, that the plaintiff agreed to equip a factory with a system of automatic fire sprinklers, in accordance with the rules and regulations of the New York board of fire underwriters, and do all the work and furnish all the material for such system for a certain price payable "after a certificate of approval should have been issued" by such board of underwriters — that the contract was silent as to the form or substance of the certificate — that payment had been refused by defendant and the action defended upon the ground that the contract called for a certificate that would enable the defendant to secure reduced rates of insurance and that such certificate had not been furnished — that the board did make a statement certifying in effect that the plaintiff had fully complied with the contract, but refused to grant the desired certificate for the reason that the water supply of the factory was insufficient, the supply pump defective and the building beyond the reach of a fully organized paid fire department — and there was evidence tending to show that the situation was such as to render it impossible for the plaintiff to secure the certificate under the rules of the board until such objections had been removed — that defendant and his tenants were able to obtain, and were in fact offered, such reduced rates of insurance as were contemplated by the provisions of the contract with respect to the

procurement of the certificate before payment, and this, too, by reason of plaintiff's work in introducing the sprinkler system into the factory, *held*, that it was reversible error to direct a verdict for defendant, since the jury might have found that it was defendant's default that prevented the issuance of the certificate, and also that, by reason of plaintiff's work, defendant was offered and could have enjoyed every advantage without the formal certificate that he could obtain or enjoy with it, and under such findings the defendant would have no reasonable ground for refusing to pay the contract price of the work and would, in equity, be bound to pay it.

N. Y. & N. H. Sprinkler Co. v. Andrews, 62 App. Div. 8, affirmed.

(Argued November 25, 1902; decided December 9, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 12, 1901, reversing a judgment in favor of defendant entered upon a verdict directed by the court and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Michael H. Cardozo and *Raymond Rubenstein* for appellant. The rule is absolutely well settled that in order to enable a party to recover upon a contract he must comply with whatever condition precedent there is contained therein. (*Mitnacht v. Wolff*, 6 N. Y. S. R. 44; *Beebe v. Johnson*, 19 Wend. 500; *Baker v. Johnson*, 42 N. Y. 126; *Ward v. H. R. B. Co.*, 125 N. Y. 230, 236; *Moore v. S. P. & B. Co.*, 101 Fed. Rep. 591; *Herter v. Mullen*, 159 N. Y. 28; *U. S. v. Gleason*, 175 U. S. 588; *Wheeler v. Ins. Co.*, 82 N. Y. 543; *Tompkins v. Dudley*, 25 N. Y. 275; *Harmony v. Bingham*, 12 N. Y. 99.) Evidence of the defendant's purpose in making the contract which was known to the plaintiff was properly admissible, and it showed that the procurement of the certificate of the board of underwriters was the inducing cause for the making of the contract, and that the certificate and not the sprinkler equipment was the main thing contracted for. (Beach on Cont. § 740; *Smith v. Kerr*, 108 N. Y. 31; *B. & O. R. R. Co. v. Brydon*, 65 Md.

198; *Browne v. Patterson*, 36 App. Div. 167; *Gillet v. Bank of America*, 160 N. Y. 549.) The testimony of the defendant to the effect that the certificate was the main thing contracted for was not contradicted or discredited, and conclusively establishes that the certificate had an independent value of its own, and that its procurement was the object of the contract between the parties. (*Hull v. Littauer*, 162 N. Y. 569; *Denton v. Carroll*, 4 App. Div. 532.) There is no proof that the board of fire underwriters refused the certificate on arbitrary and unreasonable grounds, and the plaintiff was not relieved from producing it. (*Marshall v. C. T. Assn.*, 170 N. Y. 434; *L. & A. Corp. v. Thompson*, 170 N. Y. 94; *Gillet v. Bank of America*, 160 N. Y. 549; *Hill v. Priestly*, 52 N. Y. 635; *Baring v. Waterbury*, 10 App. Div. 1.)

Charles E. Hughes and *Frederick M. Littlefield* for respondent. The stipulation for payment after the issuance of a certificate of approval by the board of underwriters was subject to two important qualifications necessarily implied, *first*, that the certificate should not be unreasonably or arbitrarily refused, and, *second*, that its issuance should not be prevented by the act or default of the defendant. (*B. Nat. Bank v. Mayor, etc.*, 63 N. Y. 336; *MacK. F. S. Co. v. Mayor, etc.*, 160 N. Y. 72; *Thomas v. Fleury*, 26 N. Y. 26; *Nolan v. Whitney*, 88 N. Y. 648; *Thomas v. Stewart*, 132 N. Y. 580; *Crouch v. Gutmann*, 134 N. Y. 45; *Highton v. Dessau*, 19 N. Y. Supp. 395; *Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205; *Dannat v. Fuller*, 120 N. Y. 554.) The board of underwriters expressly approved the plaintiff's work, and the refusal to issue a certificate, so called, was due simply to the defendant's failure to provide a sufficient pump and a guaranty that steam would be kept up for its operation. (*N. E. I. Co. v. G. E. R. R. Co.*, 91 N. Y. 153; *Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205; *Genet v. D. & H. C. Co.*, 136 N. Y. 593; *McIntyre v. Belcher*, 14 C. B. [N. S.] 654; *Jacquin v. Boutard*, 89 Hun, 437; *Turner v. Goldsmith*,

L. R. [1 Q. B. 1891] 544; *M. F. D. Co. v. Mayor, etc.*, 160 N. Y. 72.) It was a question for the jury whether the plaintiff had not fully performed on its part, and whether the refusal of the certificate was not due to the failure of the defendant to do an act which, if done at all, was to be done by him and not by the plaintiff. (*Kenyon v. K. T. & M. M. A. Assn.*, 122 N. Y. 254; *Trustees v. Vail*, 151 N. Y. 470; *White v. Hoyt*, 73 N. Y. 511; *Nicoll v. Sands*, 131 N. Y. 24; *Ins. Co. v. Dutcher*, 95 U. S. 273; *Woolsey v. Funke*, 121 N. Y. 92; *McDonald v. M. S. R. Co.*, 167 N. Y. 66; *Stone v. Flower*, 47 N. Y. 566; *Trustees, etc., v. Kirk*, 68 N. Y. 459; *F. Nat. Bank v. Dana*, 79 N. Y. 108.)

O'BRIEN, J. At the close of the proofs in this case the learned trial court directed a verdict for the defendant and refused to submit any question to the jury, to which ruling and decision the plaintiff's counsel excepted. This exception is fatal to the judgment, and hence it was properly reversed by the learned court below on appeal.

The action was upon a written contract dated September 19, 1889, whereby the plaintiff agreed to equip the defendant's property with what is called the dry pipe system of automatic sprinklers, in accordance with the rules and regulations of the New York board of fire underwriters. The plaintiff was to do all the work and furnish all the materials for the introduction of the system for the contract price of \$1,400. The defendant was to bring the water from the street inside the walls of the building and to build a foundation for the tank at the rear. The contract price was payable "after a certificate of approval should have been issued by the New York Board of Fire Underwriters." The action was defended upon the sole ground that this certificate was not furnished. There is no dispute about the fact that the plaintiff, in all other respects, performed the contract. It performed the work and furnished the materials and the sprinkler system was introduced into the factory.

The board did make a certificate to the effect that the plain-

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

tiff had performed the contract and introduced into the factory a fully equipped dry pipe system, and added to the statement the following qualifications, or explanation: "No certificate can be issued for this equipment because it does not fulfill the requirements of this board in the following particulars, viz.: The premises are located beyond the reach of a fully-organized paid fire department, and provision is not made to supply the pipes with water automatically upon the opening of a sprinkler head, and the pump is not of 500-gallon capacity per minute, and there is no guarantee that steam will be maintained at all times to work pump."

The contract is silent with respect to the form or substance of the certificate to be procured from the board before payment of the contract price of the work. If it was merely a certificate that the work had been properly performed in conformity with the terms of the contract, then the requirement was complied with. If, on the other hand, it was contemplated that the certificate should be in such form as to entitle the defendant, or his tenants, to reduced rates of insurance upon the property, then it sufficiently appears that the board declined to make it, and, hence, the plaintiff was unable to procure it. It is assumed by the learned counsel for the defendant that the latter form of certificate is what the contract calls for, and the nature of the transaction and the conduct of the parties seem to support his contention in this respect. The precise thing that the board was to certify to, or the precise form of the certificate, is not clearly stated in the contract. The board did certify that the plaintiff introduced the dry pipe system into defendant's factory in the proper way and according to such rules or methods as it had established for doing work of that character. The contention is that the contract called for a certificate that would enable the defendant to secure reduced rates of insurance; but even so, it cannot be construed to mean that the plaintiff was to furnish a fire department, or a water supply, if these things were prerequisites to the issuance of the certificate. All it could reasonably mean was that the plaintiff's work should be

of such a character as to call for a certificate within the rules of the board.

Assuming that this is the interpretation of the contract, the fact, however, remains that something was to be done on the part of the defendant in order to accomplish the desired result. The stipulation for payment after the issuance of such certificate by the board was subject to certain qualifications necessarily implied from the nature of the undertaking, and these were that the certificate should not be unreasonably or arbitrarily refused and the issuance of it should not be prevented by the act or default of the defendant. It will be seen from the statements of the board, and it is apparent from the whole case, that the refusal to issue the formal certificate that the defendant claims was a condition precedent to any obligation on his part to pay, was upon the ground and for the reason that the water supply was insufficient, the pump defective and the building beyond the reach of the fire department. These objections have no relation whatever to the work that the plaintiff contracted to perform. If the situation was such as to render it impossible to procure the certificate under the rules of the board, the default in that respect was that of the defendant and is not to be imputed to the plaintiff as a ground for depriving it of all compensation for work performed according to the stipulations of the contract. The plaintiff had nothing to do with the water supply, or the pump or the unfavorable location of the premises with reference to a fire department. The contract by express terms, or by reasonable implication required the defendant to remove these objections before he could insist upon the certificate as a condition of the payment of the contract price. The plaintiff did not contract to furnish such a certificate as the defendant insists upon, irrespective of the location or condition of the factory for the use and operation of the system. If it became impossible by reason of things within the defendant's control to obtain such a certificate, that is not the fault of the plaintiff so long as it complied with the rules of the board concerning the mode and manner of doing the work and the kind and

quality of the materials employed. If it turned out, as it did, that the factory was not protected by any fire department and had no sufficient pump or water supply, these were matters that the defendant was to remedy, and if the certificate could not be obtained until the objections were removed the defendant was not in a position to insist upon the condition, but in equity was bound to pay for the work which the plaintiff had performed.

The evidence was of such a character that the jury could well have found that it was defendant's default in these particulars that prevented the issuance of the certificate, and so the judgment entered on the direction of a verdict for defendant was properly reversed on that ground.

There was evidence in the case tending to show that the defendant and his tenants were able to obtain, and were in fact offered, such reduced rates of insurance as were contemplated by the provisions of the contract with respect to the procurement of the certificate before payment, and this, too, by reason of plaintiff's work in introducing the dry pipe sprinkler system into the factory. On the theory that the use of the certificate by the defendant in order to obtain reduced rates of insurance was a material part of the consideration for the contract, the jury should have been permitted to consider this testimony. The jury could have found that not only was the issuance of the certificate prevented by the defendant's default, but that by reason of the plaintiff's work he was offered and could have enjoyed every advantage without the formal certificate that he could obtain or enjoy with it. Such a finding would deprive the defendant of all reasonable grounds for refusing payment of the contract price of the work.

The learned court below, we think, properly reversed the judgment, and the order and judgment of that court directing a new trial should be affirmed, and judgment absolute rendered in favor of the plaintiff on the stipulation, with costs.

PARKER, Ch. J., MARTIN, VANN and WEENER, JJ. (and GRAY and CULLEN, JJ., in result), concur.

Order affirmed, etc.

JOHN SCHWAN, Appellant, v. THE CITY OF NEW YORK,
Respondent.

NEW YORK (CITY OF) — CONTRACT MADE BY TRUSTEES OF VILLAGE MERGED IN CITY BY CHAPTER 378 OF LAWS OF 1897 — WHEN RECOVERY MAY BE HAD THEREUNDER AGAINST THE CITY. Where, upon the trial of an action brought against the city of New York upon a contract made in December, 1897, by the trustees of an incorporated village for sprinkling the streets thereof from May 1 to October 1, 1898 — which village, under the provisions of the Greater New York charter (L. 1897, ch. 378), had become merged with the city on the 1st day of January, 1898 — it appeared from the complaint and the opening of plaintiff's counsel, *first*, that, pursuant to the Greater New York charter, a budget had been prepared by the proper authorities of the village, which included the contract in question, and that taxes had been accordingly levied; and, *second*, that the contract had been fully performed, with defendant's knowledge, it is reversible error to dismiss the complaint upon the ground that the trustees of the village had no right to make the contract, the performance of which extended beyond their fixed terms of office. The plaintiff should have been allowed to try his case and to prove, if he could, that the contract sued upon had been, in good faith, made and included in the budget for the year 1898; that the taxes required under the budget had been levied for 1898, and that the work called for by the contract had been fully performed.

Schwan v. City of New York, 65 App. Div. 420, reversed.

(Argued December 8, 1902; decided December 16, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 26, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John J. Lenehan for appellant. The complaint states facts sufficient to constitute a cause of action. (*Clews v. Bank of N. Y.*, 105 N. Y. 398; *Ketchum v. Van Dusen*, 11 App. Div. 334; *Sanders v. Soutter*, 126 N. Y. 193; *Herbert v. Duryea*, 87 Hun, 288; *Kain v. Larkin*, 141 N. Y. 149;

N. Y. Rep.]

Points of counsel.

Kley v. Healey, 127 N. Y. 555 ; *Wenk v. City of New York*, 171 N. Y. 607.) The contract was lawfully made under the authority and powers contained in section 10 of the charter of the city of New York. (L. 1897, ch. 378, § 10 ; *Palmer v. Vandenberg*, 3 Wend. 193 ; *Matter of School Board*, 34 App. Div. 49 ; *People ex rel. v. York*, 33 App. Div. 573 ; *Mayor, etc., v. Sands*, 105 N. Y. 218 ; *People ex rel. v. Chapin*, 105 N. Y. 316 ; *Matter of City of Buffalo*, 68 N. Y. 172 ; *M. Co. v. Kaldenberg*, 165 N. Y. 1 ; *People ex rel. v. Lacombe*, 99 N. Y. 49.) There is no general rule that public officers can make contracts to continue only during their terms. (*Wait v. Ray*, 67 N. Y. 36 ; *Gillis v. Space*, 63 Barb. 179 ; *Palmer v. Vandenberg*, 3 Wend. 193 ; *People v. Supervisors*, 32 N. Y. 473 ; *Williams v. Keech*, 4 Hill, 168 ; *Silver v. Cummings*, 7 Wend. 181 ; *Morrow v. Ostrander*, 13 Hun, 219 ; *Todd v. Birdsall*, 1 Cow. 260 ; *Bell v. City of New York*, 46 App. Div. 195 ; *Weston v. City of Syracuse*, 17 N. Y. 110 ; *Blood v. Electric Co.*, 68 N. H. 340.) The case of *Hendrickson v. City of New York* (160 N. Y. 144) was based on a different state of facts, expressly avoided the condemnation of contracts made in good faith, did not involve a consideration of section 10 of the charter or a contract for which funds had been provided. (*Stuber v. Coler*, 164 N. Y. 22 ; *Abb. Tr. Ev.* [2d ed.] 41 ; *Nelson v. Eaton*, 26 N. Y. 410 ; *Bennett v. Clough*, 1 Barn. & Ad. 461.) The court was bound to take judicial notice of the charter. (1 Kent's Comm. 460.) To permit the defendant to escape payment of the contract price would be inequitable and unjust. Having had the full benefit of the contract, the defendant is estopped from denying its validity. (*B. G. L. Co. v. Claffy*, 151 N. Y. 24 ; *P. J. W. Co. v. Village of Port Jervis*, 151 N. Y. 111 ; *Moss v. Cohen*, 158 N. Y. 249 ; *W. A. Co. v. Barlow*, 63 N. Y. 62 ; *Mayor v. Sonneborn*, 113 N. Y. 426 ; *Jourdan v. L. I. R. R. Co.*, 115 N. Y. 380 ; *Peck v. D. & W. Co.*, 57 Hun, 343 ; *Bissell v. M. S., etc., R. R. Co.*, 22 N. Y. 258 ; *Moore v. Mayor, etc.*, 73 N. Y. 238 ; *People ex rel. v. Havemeyer*, 4 T. & C. 365.)

George L. Rives, Corporation Counsel (James McKeen of counsel), for respondent. There is no jurisdiction to entertain this appeal. (Code Civ. Pro. § 191, subd. 2; *Boyd v. Gorman*, 157 N. Y. 365.) The decision of the Appellate Division was rightly put upon the ground that the alleged contract falls clearly within the doctrine laid down in *Hendrickson v. City of New York* (38 App. Div. 480; 160 N. Y. 144). (*Waite v. Ray*, 67 N. Y. 36.) The principle that a corporation like an individual is estopped from pleading *ultra vires* as a defense upon a contract where such defendant has accepted and retained the benefits of the contract, and that in such cases, even though the contract be technically invalid, there may be a recovery upon *quantum meruit*, do not extend to situations where the contract is one against public policy. (*McDonald v. Mayor, etc.*, 68 N. Y. 23; *B. G. L. Co. v. Claffy*, 151 N. Y. 24.)

GRAY, J. The complaint shows that the action was upon a contract, made with the village of Arverne-by-the-Sea, to recover the sum due thereunder for sprinkling the streets from May 1st to October 31st, 1898; that the village was a municipal corporation of the county of Queens, which became merged with the city of New York; that the plaintiff fully performed the work called for by the agreement and that payment therefor had been refused. When the case came on for trial, the plaintiff's counsel repeated, in his opening, the facts of the complaint and he stated that the village was one of the municipalities consolidated with the city of New York by the provisions of "Greater New York Charter;" that the board of trustees of the village had duly authorized the contract sued upon; that they had ample funds at the time to meet the contract, which, upon the consolidation, were, with uncollected tax levies, transferred to the defendant; that, pursuant to section 10 of the Greater New York charter, the board of trustees, in 1897, prepared a budget for the year 1898, "which included the contract and levied taxes accordingly." Upon this opening, the defendant moved for a dis-

missal of the complaint, upon the ground that the trustees had no right to make the contract, the performance of which extended beyond their fixed terms. This motion was granted and the plaintiff excepted. The judgment dismissing the complaint has been affirmed, upon the authority of *Hendrickson v. City of New York*, (160 N. Y. 144).

The charter of this defendant, of which courts must take judicial notice, as a public law, as by direction of section 1620, provided, in the tenth section, that the proper authorities of the various consolidated municipal corporations should prepare in the year 1897 a budget for the year 1898 and levy taxes accordingly, as though consolidation were not to be effected. The section further provided that the funds received by the chamberlain of the city of New York should be apportioned by the board of estimate and apportionment to the various city departments, "so that such funds shall be used as nearly as may be, for the object for which they were raised," etc. Under the dismissal of the complaint, upon the motion that was made before any evidence was introduced, all the material facts alleged in the complaint, and stated for proof in counsel's opening, must be deemed to have been admitted. Therefore, two material facts must be true, viz.: *First*, that, pursuant to the Greater New York charter, a budget had been prepared by the proper authorities of the village, which included the contract in question, and that taxes had been accordingly levied, and, *second*, that the contract had been fully performed, with defendant's knowledge. The case is, thus, differentiated from that of *Hendrickson*, (*supra*), where the action of the Jamaica town board was held, upon the evidence, not to have been taken in good faith, in making a street lighting contract, to be performed in ten years, upon the eve of the termination of its official existence. Furthermore, the provisions of section 10 of the charter were not brought in question. If what the board of trustees had done was in good faith and within the provisions of the Greater New York charter, no reason is apparent why plaintiff should not be entitled to be paid for his work; especially if the

moneys had been appropriated and received by defendant for the purpose.

I think, therefore, that the plaintiff should have been allowed to try his case and to prove, if he could, that the contract sued upon had been, in good faith, made and included in the budget for the year 1898; that the taxes, required under the budget, had been levied for 1898 and that the work called for by the contract had been fully performed.

Upon these grounds I advise a reversal of the judgment and the ordering of a new trial, with costs to abide the event.

CULLEN, J. (dissenting). I dissent. By section 10 of the Greater New York charter of 1897, the various municipalities which were by that act to be consolidated with the city of New York on the 1st day of January, 1898, were directed to prepare a budget and levy taxes for that year and to turn over the proceeds of the taxes to the consolidated city. These funds were to be used "for the expenses of the city of New York as constituted by this act," and it was the duty of the board of estimate to apportion the funds to the various city departments created by the act, so that the funds might be used as nearly as possible for the purposes for which they had been raised. The conduct of the affairs of the consolidated city from and after the consolidation was vested in the officers and departments of the city. No power was given to the municipalities whose existence was to cease on the consolidation to regulate the conduct of the municipal affairs of the consolidated city during the year 1898, any more than during any subsequent year. Up to the time of consolidation the municipalities possessed their full chartered rights to manage their own affairs, and so far as the ordinary conduct of business required contracts which would naturally extend beyond the time fixed for the consolidation, those contracts would be binding on the consolidated city. But the contract on which this action is brought is not of that character. It is for an ordinary detail of the current management and maintenance of a city street and was not to commence until four months after the consolidation took effect. It seems

N. Y. Rep.]

Dissenting opinion, per CULLEN, J.

to me to fall exactly within our decision in the case of *Hendrickson v. City of New York* (160 N. Y. 144), where a contract for lighting the streets of Jamaica was held void as intended to embarrass the Greater City in the lighting of its streets. It is said, however, that the case presented a question of fact, that of good faith, and that if the village trustees made the contract in good faith it was binding on the city. "Error lurks in generalities." What is the meaning of good faith as used in this contention? No one attributes to the trustees an intention to defraud the new city, but their purpose is perfectly plain and admitted on the argument by the learned counsel for the appellant. He says that the trustees thought that the street was of such a character that it should be sprinkled during the next summer, and that they determined to make sure it would be so watered by executing before the consolidation a contract for the work. Now, whether the street should be watered after the territory became part of the Greater City of New York was a question to be determined by the officers of the new city, not by the trustees of the defunct village. Such officers might think it unwise to sprinkle the street, because they might determine to repave it or they might determine that the work could be done at less expense by making it part of a contract covering the territory of the whole borough, or by city employees, and not by contract. It is difficult to imagine a case where the intent of the officials of the village to control the subsequent conduct by the consolidated city of its own affairs could be plainer or more openly avowed.

The judgment appealed from should be affirmed, with costs.

PARKER, CH. J., O'BRIEN, BARTLETT and VANN, JJ., concur with GRAY, J.; HAIGHT, J., concurs with CULLEN, J.

Judgment reversed, etc.

THE TRUSTEES OF UNION COLLEGE, Respondent, v. THE CITY
OF NEW YORK, Appellant.

1. DEED — CONDITION SUBSEQUENT. A clause in a deed of land to a city providing that the land "is to be used for the purpose of building a city hall thereon, and this conveyance is made upon the express condition that in case the said plot of ground above described shall ever cease to be used by said Long Island City for a city hall or other similar city buildings, then, and in that case, the said plot of land shall revert back to the parties hereto of the first part as if this conveyance had not been made," creates a condition subsequent and requires the grantee to comply therewith within a reasonable time.

2. BREACH OF CONDITION. The failure of the grantee to erect a city building thereon within ten years after the acceptance of the deed, which was found by the trial court to be a reasonable time, worked a breach of the condition and the land reverts to the grantor.

3. WHEN ACQUIESCENCE DOES NOT OPERATE AS AN ESTOPPEL. The fact that the grantor did not assert its right of re-entry until fifteen years after its right to do so had accrued, does not operate as an estoppel or preclude it from insisting upon a forfeiture and from claiming possession of the premises.

4. DEMAND OF PERFORMANCE UNNECESSARY. The grantor is not compelled to demand performance before commencing an action of ejectment to recover the land.

5. DAMAGES. In such an action where the defendant is in possession the plaintiff is entitled by way of damages to the rents and profits or the value of the use and occupation of the land from the commencement of the action.

Trustees of Union College v. City of New York, 65 App. Div. 553, affirmed.

(Argued December 15, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 27, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The action is in ejectment, to recover the possession of certain described premises in Long Island City, county of Queens. The complaint alleged that a condition, upon which their conveyance had been made, had been broken, that the plaintiff was entitled to their possession, and that the defendant was in possession of the premises, or claimed to be entitled to their

possession, as successor of Long Island City, the grantee in the conveyance. The answer put in issue the allegations of the complaint, except that which related to the present ownership of the defendant.

Immediately after the description of the premises in the deed is the following language: "Said plot of land is to be used by said Long Island City for the purpose of building a city hall thereon and this conveyance is made upon the express condition that in case the said plot of ground above described shall ever cease to be used by said Long Island City for a city hall, or other similar city buildings, then and in that case the said plot of land shall revert back to the parties hereto of the first part as if this conveyance had not been made." The trial being had without a jury, the trial judge made findings of fact, to the effect that the express condition, upon which the conveyance was made, had been broken; that the defendant was in possession, or claimed to be entitled to the possession, of the premises, as the successor of the grantee in the conveyance, and "that at the date of said deed a reasonable time for the erection of a city hall, or other similar city buildings, upon the premises in question, did not exceed ten years." As conclusions of law, he held that the condition subsequent contained in the deed had been broken and that the plaintiff, by reason thereof, is seized in fee and is entitled to the immediate possession of the premises described. The judgment entered by the plaintiff upon this decision was unanimously affirmed by the Appellate Division, in the second department, and an appeal is now taken to this court.

George L. Rives, Corporation Counsel (James McKeen of counsel), for appellant. The construction of the language of the condition by the courts below was manifest error. (*Rose v. Hawley*, 141 N. Y. 366; *Packard v. Ames*, 16 Gray, 327; *Thornton v. Hammel*, 39 Ga. 202; *Pickle v. McKissick*, 21 Penn. St. 231.) Assuming that there was an implied covenant on the part of the grantee to build a city hall or other similar city buildings on the premises, it was incumbent upon

the grantor to make a demand of performance or make affirmative complaint of delay before the grantee could be put in such default as to warrant a re-entry by the grantor under the condition. (2 Pom. Eq. Juris. 281, 282.)

Percy S. Dudley for respondent. The whole clause in the deed is a valid condition subsequent. The words "upon the express condition," followed by the provision that the land shall revert in case of non-performance, are technically proper to create a condition subsequent. (1 Washb. on Real Prop. ch. 14, 445; *McCullough v. Cox*, 6 Barb. 386; *Stuyvesant v. Mayor, etc.*, 11 Paige, 414; *Underhill v. S. R. R. Co.*, 20 Barb. 455; *Hayden v. Stoughton*, 5 Pick. 528; *Upington v. Corrigan*, 69 Hun, 320; 79 Hun, 488; 151 N. Y. 143; *Rose v. Hawley*, 118 N. Y. 502.) Failure to erect a city hall or other similar building within a reasonable time constituted a breach of the condition. (*Stuyvesant v. Mayor*, 11 Paige, 414; *Underhill v. S. R. R. Co.*, 20 Barb. 466; *Atwood v. Norton*, 27 Barb. 648; *Coffin v. Talman*, 8 N. Y. 469; *Palmer v. P. R. Co.*, 11 N. Y. 389; *Spaulding v. Hallenbeck*, 35 N. Y. 207; *Austin v. Cambridgeport*, 21 Pick. 215; *Hayden v. Stoughton*, 5 Pick. 528; *Allen v. Howe*, 105 Mass. 241; 1 Washb. on Real Prop. ch. 14, par. 10; *Wright v. Bank of Metropolis*, 110 N. Y. 237.) The grantee being under no legal obligation to perform the condition, the grantor cannot require him to do so and a formal demand would be futile. (Gerard on Titles, 138, 808; *Lawrence v. Williams*, 1 Duer, 585; *Plumb v. Tubbs*, 41 N. Y. 442; *Hosford v. Ballard*, 39 N. Y. 147.) In addition to the recovery of the land the plaintiff was entitled to recover the rental value of the land or the value of its use and occupation from the time of the commencement of the action to the date of the trial under its general claim for damages for withholding possession. (*Clason v. Baldwin*, 152 N. Y. 204; *Danziger v. Boyd*, 120 N. Y. 628.)

GRAY, J. The opinion delivered at the Appellate Division by Mr. Justice JENKS very ably and accurately reviews the

legal questions presented and abridges the discussion here. Whether a condition in a deed is a condition precedent, or a condition subsequent, depends upon a construction of the language used by the grantor, in connection with the purpose of the grant. In this case I think there is no room for doubt as to the nature of the condition, upon which the grantee took an estate in the premises conveyed. (*Stuyvesant v. Mayor etc., of N. Y.*, 11 Paige, 414; *Upington v. Corrigan*, 151 N. Y. 143.) The language of the deed expressed a condition, which was to defeat, not to create, an estate in the grantee. The grantor had parted with every interest and estate in the real property conveyed. The act to be performed by the grantee followed the vesting of the estate and the language imported a condition merely, and not a covenant. The case, therefore, being one of a conveyance of land upon condition subsequent, came within the operation of the rule in such cases, that the grantee should comply within a reasonable time with the condition. (Washburn on Real Property, *449.) The trial judge found as a fact that ten years, at the date of the conveyance, was a reasonable time for the purpose expressed in the condition. It was conceded that up to the commencement of the action in 1898, a period of twenty-five years, no city building had ever been erected. In that respect, the case is similar to that of *Upington v. Corrigan* (*supra*); where the condition of the grant was that a church building should be erected and where it was held that a reasonable time for such erection was the period of ten years. (See *Stuyvesant v. Mayor etc., of N. Y.*, *supra*; *Palmer v. Ft. Plain & C. Plank Road Co.*, 11 N. Y. 376; *Hayden v. Stoughton*, 5 Pick. 528.) With the finding as to a reasonable time for compliance by the grantee, in this case, I think this court cannot interfere. The evidence shows that, while the condition of the property in 1873, when the conveyance was made, was that of farming land, in 1874, and for several years subsequent thereto, the land was improved and streets were laid out, graded, sewered, flagged, etc.

The appellant argues that the condition of the conveyance

upon which the land should revert back, was if it "shall ever cease to be used by said Long Island City for a city hall or other similar city buildings;" and as no building was, in fact, erected, the condition did not arise. I see no force in the argument. The whole language, in which the condition is expressed, must be considered and then it becomes quite apparent that the condition of the conveyance, which the grantee accepted, was that a city hall, or building, was to be erected and that, if the land should ever cease to be used for such purposes, the land should revert to the grantor. The condition was the use and the continuing use of the land for the purpose of the grant. The long-continued silence of the plaintiff could not operate as an estoppel upon, or preclude, it from insisting upon a forfeiture, and from claiming possession of the premises. The effect of an express condition in a deed cannot be destroyed by silent acquiescence. (*Jackson ex dem. v. Chrysler*, 1 Johns. Cases, 125.) The title to the property was vested in the grantee and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant. If it elected to await compliance as long as it did, that fact cannot be construed against its right to reclaim possession.

The appellant argues that it was incumbent upon the plaintiff to demand performance before it could become entitled to re-enter, as for condition broken. If this clause was in the nature of a covenant by the grantee, a demand might be necessary; but, being a condition subsequent, proof of demand of possession before commencing the action was unnecessary. (*Plumb v. Tubbs*, 41 N. Y. 442.)

As to the right to damages, the reasoning of the learned justice at the Appellate Division is quite conclusive. The allegation in the complaint that the defendant was in possession of the premises, or claimed to be entitled to their possession as successor of Long Island City, the grantee in the deed, was not denied by the answer. The evidence, amply, shows that the defendant was in possession. Within the authority of *Clason v. Baldwin*, (129 N. Y. 183, 189), the plaintiff, in

N. Y. Rep.]

Statement of case.

recovering judgment, was entitled, by way of damages, to the rents and profits, or the value of the use and occupation of the land, from the commencement of the action.

The judgment below was right and I advise its affirmance here, with costs.

PARKER, Ch. J., O'BRIEN and BARTLETT, JJ., concur; HAIGHT, J., dissents; CULLEN and WERNER, JJ., absent.

Judgment affirmed.

CLARISSA WEATHERWAX CONKLING, Appellant, v. JOHN T. WEATHERWAX et al., Respondents, and EMILY A. TOMPKINS, Appellant, Impleaded with Others.

EQUITY—SUPERIORITY OF LIEN OF LEGACY CHARGED UPON REAL ESTATE TO THAT OF MORTGAGE GIVEN BY RESIDUARY DEVISEE—NEGLECT OF LEGATEE TO ENFORCE PAYMENT OF LEGACY. Legacies payable "out of my said farm by my executors," which farm, together with the personal property, was devised to the testator's son as residuary devisee after the payment of such legacies and other charges, but could not be sold or disposed of during the life of the widow without her consent, are liens upon the farm and are superior to the lien of a mortgage given by the devisee, during the life of the widow, upon his interest in the property although by his acceptance of the devise he became personally liable for the payment, and the legatees neglected to proceed against him, where it does not appear that the mortgagee has given actual notice to them of the mortgage, has requested them to proceed against the devisee or his estate in order to discharge the lien, and that he has suffered actual damage which could have been avoided by timely proceedings upon their part against the devisee.

Conkling v. Weatherwax, 66 App. Div. 617, reversed.

(Argued December 15, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 19, 1901, affirming a judgment in favor of defendant Hannah M. Hidley, entered upon a decision of the court at a Trial Term without a jury.

On May 8, 1868, Henry Weatherwax died leaving a last will and testament wherein, amongst other things, he pro-

vided for certain care and income and privileges to be furnished to his widow by his son, Charles Weatherwax, or the occupant of his farm after his decease, out of the profits of said farm, and also setting apart to his widow a part of his dwelling house.

He gave to his daughter Clarissa "The sum of one thousand dollars, to be paid to the said Clarissa S. Weatherwax two years after my decease, the same to be paid out of my farm, by my executor."

After the devise of certain specific articles to his daughter Emily, the will further provides as follows: "And finally the said Emily Ann Eliza shall be paid out of my said farm, by my executor, hereinafter named, the sum of one thousand dollars. * * * The one thousand dollars to be paid ten years after Clarissa S. is paid her one thousand dollars herein provided, or twelve years after my decease."

The will further provides as follows: "I also give and bequeath to my son Charles all my real estate and personal property after the payment of my just debts and funeral expenses, together with the expense of settling my estate, and the payment of the above-named legacies, to have and to hold the said farm and all remaining and unappropriated personal property, to him and his heirs and assigns forever, but my son Charles shall not have the right to sell or dispose of the said real estate during the widowhood of his mother without obtaining his mother's consent."

The testator in and by his will appointed his son Charles executor of his estate.

Henry D. Merchant and *Abel Merchant, Jr.*, for appellants. The unanimous affirmance by the Appellate Division has conclusively established the truth of the judge's findings of fact. (Const. of N. Y. art. 6, § 9; *People ex rel. v. Barker*, 152 N. Y. 417; *People v. Helmer*, 154 N. Y. 596; *Marden v. Dorothy*, 160 N. Y. 39; *Hilton v. Ernst*, 161 N. Y. 226; *Hay v. Knauth*, 169 N. Y. 298; *Krekeler v. Aulbach*, 169 N. Y. 372.) The theory on which the original order

of priority of the liens of the legacies and of the defendant Hidley's mortgage has been transposed is untenable either within the facts or as an abstract proposition of law. (*Sherman v. Foster*, 158 N. Y. 587; *Huffman v. Hulbert*, 13 Wend. 377; *Wheeler v. Benedict*, 36 Hun, 478; *Marsh v. Dunckel*, 25 Hun, 167; *H. M. Co. v. Farrington*, 82 N. Y. 121; *Carter v. White*, L. R. [25 Ch. Div.] 666; *H. Ins. Co. v. Halsey*, 8 N. Y. 271, 273; *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 414; *Kendall v. Niebuhr*, 58 How. Pr. 156; *Patty v. Pease*, 8 Paige, 277.) That the legatees had adequate remedies at law or that they had acted to the prejudice of the defendant Hidley's rights are matters which were neither pleaded nor proven. (*Wright v. Delafield*, 25 N. Y. 266; *O'Toole v. Garvin*, 1 Hun, 92; *Center v. Weed*, 63 Hun, 560; *Converse v. Sickles*, 16 App. Div. 49; *Olivella v. N. Y. & H. R. R. Co.*, 31 Misc. Rep. 203; *Tripp v. Hunt*, 45 App. Div. 100; *Hammond v. Earle*, 58 How. Pr. 426; *Ostrander v. Weber*, 114 N. Y. 95; *Gage v. Lippman*, 12 Misc. Rep. 93; *Crisfield v. Murdock*, 127 N. Y. 315.) The charge of *laches* involved in the theory of the trial court as to the personal liability of Charles, upon which the judgment was based, is misleading, is unsupported by facts and is inconsistent with the express conclusions of law set forth in the decision. (*Wagner v. Grimm*, 169 N. Y. 421; *Krekeler v. Aulbach*, 169 N. Y. 372; *Wicks v. Thompson*, 129 N. Y. 634; *People v. Featherly*, 131 N. Y. 597; *Wright v. Wright*, 37 Mich. 55; *Paschall v. Hinderer*, 28 Ohio St. 568; *Prewitt v. Bunch*, 101 Tenn. 723; *Dugan v. O'Donnell*, 68 Fed. Rep. 983; *Ryder v. Emrich*, 104 Ill. 470; *Cox v. Stokes*, 156 N. Y. 511.)

Robert E. Whalen for respondents. The affirmance by the Appellate Division having been unanimous, and no exception to the admission or exclusion of evidence being presented, the sole question to be determined upon this appeal is whether the facts found by the trial court support the conclusions of law. (*Krekeler v. Aulbach*, 169 N. Y. 372, 374.) That the legatees have failed to exhaust their remedy upon the personal

liability of Charles Weatherwax for the payment of their legacies, and that by their *laches* that remedy has been lost to them, are facts which, by the unanimous affirmance, are conclusively established. (*Berger v. Varrelmann*, 127 N. Y. 281; *Chris. St. Ry. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Adams v. Fitzpatrick*, 125 N. Y. 124; *Marden v. Dorthy*, 160 N. Y. 39.) Payment of the legacies was a personal obligation of Charles Weatherwax, and he became primarily liable therefor upon accepting the devise of the land. (*Brown v. Knapp*, 79 N. Y. 136; *Dodge v. Manning*, 1 N. Y. 298; *Kelsey v. Western*, 2 N. Y. 500; *Gridley v. Gridley*, 24 N. Y. 130; *Redfield v. Redfield*, 126 N. Y. 466; *Larkin v. Mann*, 53 Barb. 267.) The personal estate of Henry Weatherwax was not exonerated from payment of the legacies. (*Lupton v. Lupton*, 2 Johns. Ch. 614; *Hoes v. Van Hoesen*, 1 N. Y. 120; *Kelsey v. Western*, 2 N. Y. 500; *Hogan v. Kavanaugh*, 138 N. Y. 417; *Bushnell v. Carpenter*, 28 Hun, 19.) Upon taking her mortgage, Mrs. Hidley became entitled to insist that the legatees resort to the personal liability of the devisee and to the personal estate of the testator before proceeding against the land. (*Dodge v. Manning*, 1 N. Y. 298; *Kelsey v. Western*, 2 N. Y. 500; *Elwood v. Diefendorf*, 5 Barb. 398; *Towner v. Tooley*, 38 Barb. 398; *Loder v. Hatfield*, 71 N. Y. 92.) The legatees have lost their right to enforce the personal liability of Charles Weatherwax. (*Zweigle v. Hohman*, 75 Hun, 377; *Butler v. Johnson*, 111 N. Y. 204; *Schultz v. Morette*, 146 N. Y. 137.) The legatees have still a remedy against the personal estate of Henry Weatherwax. (*Goodwin v. Crooks*, 58 App. Div. 464; *Hulse v. Hulse*, 17 Civ. Pro. Rep. 92.) Having by their delay lost their remedy against the estate of Charles Weatherwax, the legatees must now resort to the personal estate of Henry Weatherwax, and they cannot proceed against the land to the prejudice of Mrs. Hidley. (*Stevens v. Cooper*, 1 Johns. Ch. 425; *De Peyster v. Hildredth*, 2 Barb. Ch. 109; *Ingalls v. Morgan*, 10 N. Y. 178; *Barnes v. Mott*, 51 How. Pr. 27.) The claims of the legatees are stale, and the legatees

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

have been guilty of such *laches* in attempting to enforce the same that equity will afford them no relief as against Mrs. Hidley. (*Dodge v. Manning*, 1 N. Y. 298; *Matter of Neilley*, 95 N. Y. 382; *Culhoun v. Millard*, 121 N. Y. 69; *Piatt v. Vattier*, 9 Pet. 405; *L., etc., Co. v. Locke*, 150 U. S. 193.) Mrs. Hidley's equities, based upon a valuable consideration, are superior to those of the legatees, arising out of a gift. (*Kelsey v. Western*, 2 N. Y. 500; 2 Pom. Eq. Juris. §§ 684, 685.)

PARKER, Ch. J. This controversy is over the priority of liens on certain real estate and is waged between the legatees of a testator on the one side and the mortgagee of his residuary devisee on the other. The courts below have held that the legacies are still liens and must be paid out of the proceeds of the sale of the real estate upon which they were charged by the testator, but not until after the payment of the amount secured by a mortgage given thereon by testator's devisee, his son, to whom the testator gave an interest in the farm after giving the legacies to his two daughters, directing the legacies to be paid out of the farm, the devise to the son being in the following words: "I also give and bequeath to my son Charles, all my real estate and personal property *after* the payment of my just debts and funeral expenses together with the expense of settling my estate, and the payment of above-named legacies." In other words, the judgment gives to the mortgagee of a devisee of the remainder after payment of legacies and other charges priority of payment over such legacies.

Our examination of the situation leads us to a different conclusion. Testator by his last will and testament gave to plaintiff and her sister legacies payable "out of my said farm by my executor." The will in terms, therefore, declares a lien upon the farm, which by a later provision of the will passes to his son Charles *after* payment of such legacies and other charges. This lien was created and recorded long before the mortgage came into existence, and the first inquiry

is: Were the legacies still liens when, on May 1, 1884, Charles gave a mortgage on his interest in the farm to defendant Hidley? They necessarily were unless (1) they had been paid, or (2) had become barred by some Statute of Limitations, or (3) the liens had been released by the legatees. It is found as a fact by the trial court that they had not been paid. There is neither finding nor evidence that the liens had been released. The Statute of Limitations had not as yet even started to run, because the will provided that the farm should not be sold during the life of the testator's widow without her consent, and also because there had not been a judicial settlement of the executor's accounts. (Code Civ. Proc., § 1819.)

It is clear, therefore, that the legacies were liens at the time when Charles gave to defendant Hidley a mortgage upon his interest in the property. And it was inferentially so found by the courts below, which held that the legacies are still a lien upon the farm, and entitled to payment next after the payment of the Hidley mortgage. The plaintiff's legacy and that of her sister, therefore, had been liens upon the farm by the express terms of the will for something like sixteen years before the giving of the Hidley mortgage, and it necessarily follows that such mortgage was at the time of its making a subsequent lien to those of the legatees which were created by the testator, for the mortgage lien was created by his devisee, whose rights in the property were by the testator subordinated to the liens of the legatees.

How, then, has it happened that these liens of the legatees have lost their priority? The legacies are still liens, for the Statute of Limitations has not run against them, and their priority cannot be taken away by a court of equity unless the legatees' conduct has been such that good conscience now requires that their priorities shall be surrendered to this mortgagee. There must at least be on the part of the legatees a failure to perform some duty which they owed defendant mortgagee by which the mortgagee lost some advantage which, but for the wrongful or neglectful act of the legatees, she would have had.

N. Y. Rep.] Opinion of the Cour., per PARKER, Ch. J.

It is suggested that when Charles accepted the devise to him, as he did when he executed the mortgage to the defendant Hidley, he became personally liable to pay the legacies, and the legatees could have proceeded against him, and should have done so for the benefit of the mortgagee, inasmuch as failure to do so would operate to release some part of the security for the payment of their legacies.

It is not the rule, however, that a prior incumbrancer is bound at his peril to search for subsequent liens when about to release a part of his security, for, in order to impose upon him the obligation to regard this equity, his conscience must be affected by knowledge of the facts upon which the equity depends, or by notice sufficient to put him upon inquiry. (*Sherman v. Foster*, 158 N. Y. 587, 596; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 273.) It was not sufficient for the defendant Hidley, therefore, to show that the legatees had lost remedies against Charles or against the estate in order to discharge the legatees' liens upon the farm to the extent of her mortgage, the liens being created by the will of the testator which was the same instrument under which Charles acquired his interest in the property. She had to go further and prove that the legatees had actual notice of her mortgage; that she requested them to proceed against Charles and that she had suffered actual damage which could have been avoided by timely proceedings against him.

Nothing of the kind is to be found in the findings, nor was any evidence offered tending to establish any one of the three facts necessary to entitle the mortgagee to secure the aid of equity in giving her lien priority to that of the legatees, for actual and definite damage to her as the result of deliberate neglect by the legatees can alone justify equity in transposing the order of the liens against the legatees' protest.

The rule is otherwise where a legatee appeals to a court of equity to impress a lien upon the real estate of a testator in his favor, for then before equity will interfere it must appear that others will not suffer because of his delay in pursuing the personality of a testator in those cases in which the per-

sonal estate is primarily liable, but in this case the aid of equity is not invoked by the legatees to impress a lien — that matter was attended to by the testator, who created a lien in advance of vesting the title in the devisee whose rights therein only were mortgaged to defendant Hidley.

The mortgagee had notice of the fact of the liens, for the will was recorded long before she acquired her mortgage. If she wished the legatees to press for collection such other securities as they had, in order to relieve to some extent the burden of their liens upon the mortgaged property, she should have informed them of her lien and made request for action on their part looking in that direction. She not only did nothing of the kind, but has failed to prove that the legatees would have secured a dollar had they resorted to all the remedies that the law gave them, and, hence, it does not appear that defendant mortgagee was ever damaged by the non-action of the legatees. There is no precedent in this state for the destruction of a lien created by operation of law or by a testator for the benefit of a subsequent lien under such circumstances, nor will established equitable principles admit of one.

The judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ., concur;
CULLEN and WERNER, JJ., absent.

Judgment reversed, etc.

GEORGE L. WILCOX, Appellant, v. THE EQUITABLE LIFE
ASSURANCE SOCIETY OF THE UNITED STATES, Respondent.

INSURANCE (LIFE) — WHEN OWNER OF STOLEN POLICY MAY MAINTAIN ACTION FOR NEW PAID-UP POLICY. Where a policy of life insurance contains a clause that if the policy should become void in consequence of a default in the payment of premiums for three years, the company would issue, in lieu of such policy, a new paid-up policy for a certain proportion of the original policy, "provided that the said policy should be surrendered duly receipted within six months of the date of default in payment of premiums on said policy," the insured, who defaulted in the

N. Y. Rep.]

Statement of case.

payment of premiums after seven annual premiums had been paid, and from whom the policy had been stolen, may maintain an equitable action for a decree directing the company to issue a new paid-up policy upon proof that the policy was stolen without his fault; that he has used due diligence to reclaim it, but has been unable to do so; that he is still the owner thereof and has never transferred or assigned his interest therein, and that he has performed all the conditions and requirements on his part, except the surrendering of the stolen policy; and it is reversible error to sustain a demurrer to the complaint in such action, upon the ground that plaintiff did not plead that he was willing to execute some instrument that would operate in law as a surrender of the policy and a discharge of the defendant's liability, since the court has power, before rendering final judgment, to require the plaintiff to execute such paper if it should be necessary for the protection of the defendant.

Wilcox v. Equitable Life Assur. Society, 55 App. Div. 529, reversed.

(Argued December 5, 1902; decided January 6, 1903.)

APPEAL from a judgment, entered January 16, 1901, upon an order of the Appellate Division of the Supreme Court in the first judicial department, affirming an interlocutory judgment of Special Term sustaining a demurrer to the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. Rider Cady and *De Witt C. Morrell* for appellant. The plaintiff's and appellant's misfortune in having the policy stolen from him through no fault of his own constitutes, in view of the fact that he has made diligent effort to recover it, a good and sufficient excuse for the failure to surrender the said policy within six months after default in payment of the premium. (*Wheeler v. C. L. Ins. Co.*, 82 N. Y. 543; *Beebee v. Johnson*, 19 Wend. 306; *Bunce v. L. Ins. Co.*, 58 Vt. 253; *Montgomery v. P. L. Ins. Co.*, 15 Bush [Ky.], 51; *Chase v. P. L. Ins. Co.*, 67 Maine, 85; *S. M. Ins. Co. v. Montague*, 84 Ky. 653.) A court of equity will recognize a good excuse and give relief in a proper case. (*Cohen v. N. Y. M. L. Ins. Co.*, 50 N. Y. 610; *Sands v. N. Y. M. L. Ins. Co.*, 50 N. Y. 626.) Where the annual premiums required for a paid-up policy have been duly paid by the assured, time ceases to be of the essence of the contract

requiring a surrender of the policy within six months. (*M. L. Ins. Co. v. Patterson*, 53 L. R. A. 378.)

W. C. Prime and *Henry H. Pierce* for respondent. The condition precedent not having been complied with, plaintiff is not in a position to demand specific performance. (Pom. on Spec. Perf. [2d ed.] § 334; *Dwight v. G. L. Ins. Co.*, 103 N. Y. 341; *Oakley v. Morton*, 11 N. Y. 25; *Howell v. K. L. Ins. Co.*, 44 N. Y. 276; *Lindenthal v. G. L. Ins. Co.*, 26 Misc. Rep. 443.)

O'BRIEN, J. The final judgment in this case sustained a demurrer to the complaint. The only question presented by the appeal is whether the complaint states facts sufficient to constitute a cause of action. It avers, in substance, that on the 9th day of October, 1883, the defendant, in consideration of the payment of an annual premium of \$58.18 per year and an agreement to pay such annual premium for twenty years, made and delivered to the plaintiff its policy of insurance whereby it insured his life in the sum of two thousand dollars and promised to pay to him, if living at the expiration of said twenty years, or in the event of his death at any time within said period to his brother, the said sum of two thousand dollars. It is then alleged that the policy contained a clause whereby the defendant promised and agreed that if the premiums on the policy for not less than three complete years from the date, to wit, October 9, 1883, shall have been duly received by the defendant and the policy should become void in consequence of default in payment of a subsequent premium, then the defendant would issue in lieu of such policy a new paid-up policy without participation in profits in favor of the plaintiff for as many twentieth parts of the original amount assured as there shall be complete annual premiums received in cash by the defendant upon the policy at the date when such default should be made, provided "that said policy shall be surrendered duly receipted within six months of the date of default in payment of premium on said policy."

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

It is then alleged that the plaintiff paid the defendant the annual premiums on the policy for seven consecutive years and duly fulfilled all conditions on his part required by said policy; that on or about the 8th of April, 1889, the policy was stolen from the plaintiff without any fault on his part, while the same was in full force and effect, and that the plaintiff has never been able to recover the same nor has it at any time since been in his possession or control, but that he has since continued to be wholly ignorant of its whereabouts, although he has made diligent effort to recover possession of it, and he is still the owner of the same and has never transferred or assigned his interest in the same.

That when the premium fell due in the year 1890 the plaintiff defaulted in the payment of the same and has made no payment since; that he has demanded from the defendant a new paid-up policy in accordance with the terms of the contract, duly informing the defendant that he surrendered his policy, but that it had been stolen and that he was unable to recover the same, and, therefore, could not deliver it to the defendant, which demand was refused; that the plaintiff has always been, and still is, ready and willing to perform on his part, except as to the delivery of the stolen policy. The relief demanded is that the defendant be decreed to issue to the plaintiff a new paid-up policy of assurance without participation in the profits for as many parts of the original policy issued by the defendant as it had received in cash complete annual premiums at the date when default was made, to wit, seven-twentieths parts of said two thousand dollars of assurance; that is to say, a paid-up policy for seven hundred dollars, besides the costs and disbursements of the action. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the courts below have sustained the demurrer.

We think that this demurrer should have been overruled, and, therefore, that the judgment should be reversed. All the facts stated in the complaint are, of course, admitted by the demurrer, and the fact that the policy was stolen from the

plaintiff without any fault on his part, and that he was unable to comply with the condition upon which the new paid-up policy was to be issued, namely, the surrender and receipt within six months of the date of default, constitutes in equity a sufficient excuse for the non-performance of that condition. The action is, in substance, one for specific performance, and, of course, the plaintiff must show that he has performed on his part or state such an excuse for non-performance as a court of equity will recognize. (*Wheeler v. Conn. Mut. Life Ins. Co.*, 82 N. Y. 543.) Equity will not deny to the plaintiff the relief sought simply because the policy had been stolen. When that fact appears, and that the plaintiff has used due diligence to reclaim it, and that he is still the owner of the policy, a case is stated which constitutes grounds for equitable relief. It is admitted that the plaintiff is unable to deliver to the defendant the policy with a receipt indorsed upon it, and this is what the condition required, but it is said that while it was not necessary under the circumstances disclosed to deliver the identical paper or policy referred to, yet the plaintiff was still able to deliver to the defendant some receipt, release or other instrument which would constitute a sufficient surrender of the policy and a sufficient discharge of all liability of the defendant.

But the condition does not, in terms, require anything of that kind. What it does require is the surrender of the identical policy with a proper receipt indorsed thereon. All agree that compliance with this condition became impossible, but the courts below have attempted to put another condition in its place, namely, the execution of some instrument that would operate in law as a surrender of the policy and a discharge of the defendant's liability. It should be observed that it does not appear that the defendant ever asked or required the plaintiff to do anything of that kind. It stood and still stands upon the condition which required a surrender of the identical policy. So far as we know or can know from the pleading it does not require anything else, and if it does, that is to say, if some other writing in the form of a release or

receipt is necessary for the protection of the defendant, then the court has power before rendering final judgment to require the plaintiff to execute such a paper, but it was not necessary for the plaintiff, in the first instance, to plead that he had volunteered to execute and deliver such a paper. The court, doubtless, has power before awarding the relief which the plaintiff demands to require him to execute and deliver such a paper, but it was not made by the contract a condition precedent to the right to maintain the action, and, therefore, it was not necessary to plead it.

The judgment should be reversed and judgment ordered for the plaintiff on the demurrer, with costs in all courts, with leave to the defendant to answer within twenty days on payment of costs.

PARKER, Ch. J., MARTIN, VANN and CULLEN, JJ., concur; GRAY, J., dissents; WERNER, J., absent.

Judgment reversed, etc.

THE NEWBURGH SAVINGS BANK, Appellant, v. THE TOWN OF WOODBURY, Defendant, and JOHN G. EARL et al., Respondents, Impleaded with Others.

MISTAKE OF LAW — DRAFTED MEN NOT LIABLE FOR MONEYS RECEIVED UNDER THE VOID DRAFTED MEN'S ACT (L. 1892, CH. 664). Money loaned to a town upon the security of bonds issued under chapter 664 of the Laws of 1892 for the relief of certain persons drafted into the military service of the United States under the act of Congress passed March 3, 1863, known as the Conscription Act, and paid over by the county treasurer to such drafted men, cannot be recovered from them by the bondholders, after the statute has been declared void by the courts of this state, where no fraud is alleged and no question of a trust in favor of or against any one is involved, since the money was received by the drafted men under a mutual mistake of law and under a claim of right, and they are under no liability to restore it to the bondholders.

Newburgh Sav. Bank v. Town of Woodbury, 64 App. Div. 305, affirmed.

(Submitted December 5, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

October 14, 1901, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles F. Brown for appellant. The rule applied by the Appellate Division that money paid under a mistake of law is "beyond the power of recall," is not applicable to the facts of this case. (2 Pom. Eq. Juris. § 842; Tiedeman's Eq. Juris. §§ 188, 189; *Moulton v. Bennett*, 18 Wend. 586; *Matter of Brown*, L. R. [32 Ch. Div.] 597; *Matter of Opera*, L. R. [2 Ch. Div. 1891] 154; *Ex parte James*, L. R. [9 Ch. App.] 609; *Havens v. Foster*, 9 Pick. 112; *Bank of Chillicothe v. Dodge*, 8 Barb. 233; *Vinal v. Con. Co.*, 53 Hun, 247; *Pitcher v. Hennessey*, 48 N. Y. 415; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Cooper v. Phibbs*, L. R. [2 H. L.] 170.) Assuming that the mistake made by the plaintiff and the supervisor was one of law, the plaintiff is entitled to recover. (Story's Eq. Juris. 121; Cooley's Const. Lim. 188.) The mistake made by the supervisor and the officers of the bank was not one of law at all, but one of fact. (Pom. Eq. Juris. § 849; Tiedeman's Eq. Juris. § 189.)

J. W. Gott for respondents. The mistake in payment was purely and only a mistake of law. (*Doll v. Earle*, 65 Barb. 301.) The payments by the county treasurer to the defendants Earl and Owens were voluntary and made on a claim of right and under no misapprehension or mistake of fact, and cannot be recovered, and if there was a mistake, it was a mistake of law. (*Shotwell v. Murray*, 1 Johns. Ch. 516; *Lyons v. Richmond*, 2 Johns. Ch. 60; *Jacobs v. Morange*, 47 N. Y. 60; *Clark v. Dutcher*, 9 Cow. 675; *Storrs v. Baker*, 6 Johns. Ch. 167; *Mowatt v. Wright*, 1 Wend. 355; *Silliman v. Wing*, 7 Hill, 159; *Bd. of Suprs. v. Briggs*, 2 Den. 26; *Wyman v. Farnsworth*, 3 Barb. 371; *Holdredge v. Webb*, 64 Barb. 10.) There was no privity between plaintiff and the

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

defendants Earl, Owens and Stokem to sustain this action. (*City of Albany v. McNamara*, 117 N. Y. 172; *Bank v. Bd. of Suprs.*, 106 N. Y. 488; *Flynn v. Hurd*, 118 N. Y. 26.)

O'BRIEN, J. On the first day of February, 1894, the plaintiff purchased from the supervisor of the town of Woodbury, one of the organized towns of Orange county, four bonds of one thousand dollars each, issued by the town, bearing date on that day and payable respectively in one, two, three and four years thereafter. The bonds were authorized to be issued by the board of supervisors of the county, under chapter 664 of the Laws of 1892, for the relief of certain persons drafted into the military service of the United States under the act of Congress passed March 3, 1863, known as the Conscription Act. The bonds on their face disclosed the authority under which they were issued and the purpose to which they were to be applied. The statute under which they were issued was declared by this court to be void as in conflict with the State Constitution. (*Bush v. Bd. Supervisors of Orange County*, 159 N. Y. 212.) The plaintiff brought this action against the town, the county treasurer and three drafted men who had been paid money under the provisions of the act. No relief was asked against the town, and it is only a nominal party. The relief demanded against the county treasurer was that he account for and pay to the plaintiff such part of the money as remained in his hands as could be traced as the proceeds of the bonds paid by the plaintiff to the town; and the relief demanded against the drafted men was that they pay over to the plaintiff any moneys received by them which could be traced in like manner. At the trial judgment was rendered in favor of the plaintiff against the county treasurer and the drafted men for certain sums or amounts that were found to represent the proceeds of the bonds or moneys paid to the town by the plaintiff upon the purchase of the bonds. No judgment was rendered against the town. The county treasurer took no appeal from the

judgment, and but two of the drafted men appealed. On their appeal the judgment rendered against them was reversed at the Appellate Division and a new trial granted, and from that judgment the plaintiff has appealed to this court.

The only question presented by the appeal is whether these two persons were liable to the plaintiff, and if so, the amount of the liability. The proceeds of the bonds were intermingled with other moneys in the treasury, one of the bonds was paid when due, and various questions of the right to interest and the methods of tracing the proceeds are involved in the inquiry concerning the amount of the liability. If these questions were material to the disposition of the case it is only fair to say that some of the objections presented and argued by the learned counsel for the defendants would be difficult to answer, but in the view that we are disposed to take with respect to the fundamental question involved, it will not be necessary to consider them. If the defendants are not liable at all, any errors committed in the statement of the account against them become wholly immaterial.

The learned court below has held that they are not liable, since the money received by them was under a mutual mistake of law and under a claim of right and, therefore, cannot be recovered from them by the plaintiff. That proposition presents the real and important question in the case. That the act under which the bonds were issued was void is admitted on all sides and at every stage of the argument. It should also be noted that the case contains no element of fraud and no question of a trust in favor of or against any one, and, hence, certain cases cited from this court, where one or both of these elements were present and made the basis of an action to compel the restoration of money, have no application. (*Am. Sugar Refining Co. v. Fancher*, 145 N. Y. 552; *Holmes v. Gilman*, 138 id. 369.) The original transaction was a loan of money by the plaintiff to the town upon the security of its bonds. There is no doubt that where a municipal corporation borrows money upon a void security it may be compelled to restore the money to the lender so long as the

money remains in the treasury or under the control of the corporation, but such cases do not involve the question of payment under a mistake of law. The right to restoration of money so received rests upon the principle that there was no consideration and that it would be unjust in the forum of conscience for the corporation to retain it. Many of the cases cited by the learned counsel for the plaintiff are cases of this character, where in the discussion the effect of a mistake of law is often referred to *arguendo* but was not really involved or made the basis of any recovery.

It must be conceded that in most text books on equity jurisprudence, and in some of the adjudged cases, *dicta* or argument of more or less force and authority may be found to the effect that in some cases equity will grant relief founded upon a mistake of law. In none of the authorities cited by the learned counsel for the plaintiff is the principle stated in clearer or broader language or more favorably for his contention than by Mr. Pomerooy in his work on Equity Jurisprudence. We may adopt all that he says with reference to the general rule and its qualifications and limitations, since the views of the learned author occupy a very prominent place in the printed argument submitted in support of the appeal:

"The doctrine is settled that, in general, a mistake of law, pure and simple, is not adequate ground for relief. Where a party with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights and liabilities, under an ignorance or error with respect to the rules of law controlling the case, courts will not in general relieve him from the consequences of his mistake. * * * While this general doctrine prevails in equity as well as at law, its operation is not universal; it is subject to modifications and limitations; equity *does* sometimes exercise its jurisdiction on the occasion of mistakes of law. If the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity in

behalf of the mistaken person, such as inequitable conduct of the other party, there can be no doubt that a court of equity will interpose its aid. Even when the mistake of law is pure and simple, equity *may* interfere. The difficulty is to ascertain any general criterion which shall determine and include all such cases." (§ 842.) And again: "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract, or personal status, and enters into some transaction, the legal scope of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." (§ 849.)

These extracts from the learned author present in a condensed form the most favorable view in support of the appeal that is sustained by any authority. But the learned author has qualified and modified much of what has been quoted above in another part of his work, and this qualification has a very material bearing on this case: "The general rule stated in the paragraph before the last, concerning mistakes as to one's own private legal rights and duties, is also subject to another important limitation. It is settled at law, and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, or with full knowledge, or with means of obtaining knowledge of all the circumstances, cannot be recovered back." (§ 851.) The discussion by the learned author of the question concerning a mistake of law, when read as a whole, does not tend to support the contention of the plaintiff in this case. Without referring to the numerous authorities cited from other jurisdictions, or attempting to explain them, it is quite sufficient to say that the rule in this state from the earliest times to the present day has been consistent and uniform in favor of the general rule that money paid under a mistake of law can-

not be recovered back. In the early case of *Shotwell v. Murray* (1 Johns. Ch. 512) Chancellor KENT stated the principle in the following terms: "A person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts on the ground of ignorance of the legal consequences which flow from those facts. I assume that this is a settled principle of law and sound policy. * * * Every man is to be charged with knowledge of the law." And subsequently in *Lyon v. Richmond* (2 Johns. Ch. 60) the learned chancellor said: "A subsequent decision of a higher court in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect and overturn such settlement. The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society there is no such pernicious precedent to be found."

Perhaps the most striking and forcible illustration of this rule is to be found in the decision of this court in the case of *Doll v. Earle* (59 N. Y. 638). There the plaintiff paid off to the defendant in 1863 a mortgage on premises that the plaintiff had just purchased, and by an agreement between them \$985.00, being the difference between gold coin and legal tender currency on the amount of the mortgage, was held to await the decree of the United States Supreme Court in the legal tender cases. When that court decided that the Legal Tender Act was unconstitutional and void as to contracts executed prior to its passage, of which this mortgage was one, the

mortgagor ordered the money paid to the mortgagee. Afterwards a reargument was allowed in the United States Supreme Court, and the validity and constitutionality of the Legal Tender Act was declared. Thereupon the mortgagor sought the court's aid to recover the money. This court held that the payment had been voluntarily made on a claim of right under no mistake of fact and could not be recovered back, although by a subsequent decision of the United States Supreme Court (*Knox v. Lee*, 12 Wall. 457) it appeared that the payment was made under a mistake of law. That case in principal ought to control the decision in the case at bar. About the same time this court decided the case of *Flower v. Lance* (59 N. Y. 603). Those cases cover the law of this State on the question, and have been cited with approval and followed as authority to the present day. (*Flynn v. Heard*, 118 N. Y. 26; *Jacobs v. Morange*, 47 N. Y. 57; *People v. Stephens*, 71 N. Y. 559; *Weed v. Weed*, 94 N. Y. 243; *Cox v. Mayor, etc., of N. Y.*, 103 N. Y. 526; *First National Bank of Ballston Spa v. Bd. Supervisors Saratoga Co.*, 106 N. Y. 488; *Vanderbeck v. City of Rochester*, 122 N. Y. 289; *Redmond v. Mayor, etc., of New York*, 125 N. Y. 632.)

We think that the general rule that money paid under a mistake of law cannot be recovered back, which was asserted and applied in these cases, is applicable to the case at bar. The two drafted men who appealed from the judgment had no contract relations with the plaintiff; they owed to it no duty, express or implied. There is no privity between them and the plaintiff. The plaintiff did not pay to them any money at any time. What the plaintiff did was to loan money to a municipal corporation on void securities which the plaintiff could recover so long as it remained under the control of the borrower, but when the town in this case disbursed the money for the purpose for which it was raised, to various persons who claimed and received it as a right, the rule referred to will protect the defendants. The plaintiff advanced the money to the town on its bonds for the very purpose of enabling the town to discharge what was supposed to be its

N. Y. Rep.]

Statement of case.

obligation to the drafted men, and the latter received the money by virtue of the law as it then existed under a claim of right. All parties supposed at the time that the drafted men were entitled to the money and that it was their legal right to receive it. It now turns out that they were all mistaken, but it was a mistake of law and, therefore, the drafted men who received the money under the circumstances are not under liability to the plaintiff to restore what they have received.

It follows that the order appealed from should be affirmed and judgment absolute rendered against the plaintiff on the stipulation, with costs to the defendants who have appealed in all the courts.

PARKER, Ch. J., GRAY, VANN and CULLEN, JJ., concur; MARTIN and WERNER, JJ., absent.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
MAX LIGHTMAN, Appellant.

CRIMES — USE OF CARBONIC ACID GAS IN THE MANUFACTURE OF SODA WATER IN A TENEMENT HOUSE NOT A MISDEMEANOR UNDER SECTION 389, PENAL CODE. The fact that one who manufactured soda water in the basement of a tenement house used carbonic acid gas in the process and that such gas is a "compressed gas," will not support his conviction for a misdemeanor in violating section 389 of the Penal Code as it stood before the amendment of 1902 (L. 1902, ch. 486) prohibiting, among other things, the manufacture of compressed gases or of any explosive articles or compounds, where there is no evidence that the carbonic acid gas used was manufactured on the premises and none to show that soda water is an explosive or its manufacture dangerous.

People v. Lichtman, 65 App. Div. 76, reversed.

(Argued December 8, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 2, 1902, which affirmed a judgment of the Court of

Special Sessions of the city of New York convicting the defendant of a misdemeanor.

The facts, so far as material, are stated in the opinion.

David Steckler for appellant. The information is insufficient upon the face thereof and fails to set forth the commission of a crime. (Penal Code, § 389.) Unless it is shown that the defendant's business is a menace to the public health or safety, the restriction placed upon him by the act is an invasion of his constitutional rights. (*Matter of Jacobs*, 98 N. Y. 96; *People v. Gillson*, 99 N. Y. 377; *People v. Rosenberg*, 138 N. Y. 410; *People v. Marx*, 99 N. Y. 377.)

William Travers Jerome, District Attorney (*Robert C. Taylor* of counsel), for respondent. Since defendant admitted that he did manufacture soda water by introducing carbonic acid gas in a tank containing water at a pressure of from 175 to 200 pounds to the square inch, and that said carbonic acid gas under said pressure was compressed gas, he was properly convicted. (Penal Code, § 389.) Section 389 of the Penal Code is constitutional. (*People ex rel. v. Bd. of Suprs.*, 147 N. Y. 1; *Matter of Jacobs*, 98 N. Y. 98; *People ex rel. v. Warden*, 157 N. Y. 148.) The legislature has the power to establish an arbitrary standard of safety. (*People v. Cipperly*, 101 N. Y. 634; *Jones v. Brim*, 165 U. S. 183; *People v. Hawker*, 152 N. Y. 234; *Hawker v. New York*, 170 U. S. 189; *Barbier v. Connelly*, 113 U. S. 27.)

HAIGHT, J. The defendant was arrested, charged with the offense of manufacturing soda water upon the premises known as 61 Broome street, in the city of New York, which premises were occupied by families for living purposes. The trial took place in the Court of Special Sessions, and the only evidence taken was that of the admission of the defendant, which is as follows :

"1. That he occupies with his family rooms at No. 61 Broome street, in the city of New York ;

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

"2. That said house is a tenement house, in which several families live and have lived ;

"3. That in the basement of said house, while so occupied by families, he manufactured soda water on the 16th and 17th days of February, 1901 ;

"4. That said soda water was manufactured by him by introducing carbonic acid gas in a tank containing water at a pressure of from 175 to 200 pounds to the square inch, and agitated the water and carbonic gas in said tank while under said pressure for some ten or fifteen minutes.

"5. That the said carbonic acid gas under said pressure is compressed gas.

"6. That in the presence of the complainants, Robert K. Power and Arthur A. Glandel, he manufactured in said basement soda water in the manner above described on the 16th and 17th days of February, 1901. Dated New York, June 27th, 1901."

This admission was signed by the defendant and by his attorney, and upon it the court found him guilty of the offense charged and imposed a fine of \$25.00. The provisions of section 389 of the Penal Code, under which the defendant was convicted, so far as are material, provide as follows :

"A person who manufactures gunpowder, dynamite, nitroglycerine, liquid or compressed air or gases, except acetylene gas and other gases used for illuminating purposes, naphtha, gasoline, benzine or any explosive articles or compounds, or manufactures ammunition, fireworks or other articles of which such substances are component parts in a cellar, room or apartment of a tenement or dwelling house or any building occupied in whole or in part by persons or families for living purposes, is guilty of a misdemeanor."

It will be observed that the manufacture of soda water is not prohibited by any express provisions of the Code to which we have referred, but it is contended that, under the admission, the carbonic acid gas used was *compressed gas*, and that, therefore, the case was brought within the provisions of the Code. But it was not shown that the carbonic acid gas was

manufactured upon the premises. It was only used by the defendant after it had been manufactured. It is a matter of common knowledge that carbonic acid gas is manufactured and compressed into heavy metal tubes and is then sold as an article of merchandise; that as soon as the compressed gas escapes from the tube into the water it expands and permeates the water, thereby losing its character as compressed gas. Under the admission of the defendant it appears that he used this gas with which to charge a tank of water; that he allowed the compressed gas to escape from the tube into the water, agitating and permeating it, for a period of ten or fifteen minutes. The provisions of the Code to which we have referred prohibit the manufacture of compressed gases, but they do not prohibit their use in the manufacture of other compounds or articles, unless they are explosives, and, therefore, dangerous.

In this case there has been no admission or evidence offered to show that soda water is an explosive, or that its manufacture is dangerous, and we think that the courts cannot take judicial notice that such is the case. It is quite evident that the legislature considered its manufacture to be harmless, for after the conviction of the defendant in this case it amended these provisions of the Code by specifically providing that "Nothing in this section contained shall be construed to prohibit or forbid the manufacture and sale of soda water, seltzer water, ginger ale, carbonic or mineral water, or the charging with liquid carbonic acid gas of such waters or ordinary waters, or of beer, wines, ales and other malt and vinous beverages in such cellar, room or apartment of a tenement or dwelling house, or any building occupied in whole or in part by persons or families for living purposes." (Chapter 486 of the Laws of 1902.)

We think that the judgment of conviction should be reversed, and that the defendant should be discharged.

PARKER, Ch. J., GRAY, O'BRIEN, VANN and CULLEN, JJ., concur; BARTLETT, J. dissents.

Judgment of conviction reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
AUGUST PRILLEN, Appellant.

1. JURISDICTION — PORTION OF EAST RIVER WITHIN JURISDICTION OF CITY OF NEW YORK. That portion of the East river flowing between the old cities of New York and Brooklyn was part of the old city of New York, and that city having been consolidated with the outlying municipalities by the present charter, such portion of the East river is clearly within the jurisdiction of the present city.

2. NEW YORK (CITY OF) — PROVISIONS OF CHARTER (L. 1901, CH. 466, § 343) REQUIRING ENGINEERS OPERATING BOILERS WITHIN THE CITY TO HAVE LICENSE FROM POLICE DEPARTMENT ARE NOT APPLICABLE TO ENGINEERS OF BOILERS TEMPORARILY WITHIN THE CITY. Section 343 of the present charter of the city of New York (L. 1901, ch. 466), providing that it shall not be lawful for any person to operate or use steam boilers therein specified without having a certificate of qualification therefor issued by the police department of the city, must be read in connection with section 342, providing for the inspection of boilers within the city, and so read relates only to steam boilers permanently located and in use in the city of New York; and where a foreign corporation, engaged, under a contract with the United States government, in removing an island from the East river, had steam boilers for the prosecution of the work temporarily within the limits of the city, an engineer employed by such corporation is not liable to arrest and conviction under section 343 for operating such boilers without having a certificate of qualification issued by the police department of the city.

People v. Prillen, 78 App. Div. 207, reversed.

(Argued December 8, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 6, 1902, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of a misdemeanor.

The facts, so far as material, are stated in the opinion.

Robert D. Benedict for appellant. The "city of New York," as defined in the charter, does not include the East river. (L. 1897, ch. 378, § 1.) The Court of Special Sessions had no jurisdiction over the alleged offense. (L. 1897, ch. 378, § 1406.) The provision of the charter of the city of New York in question was intended to apply only to boilers

on land. (L. 1897, ch. 378, § 343.) To sustain this judgment would be to lay a new and oppressive burden on the commerce of the port of New York. (*People v. Lambier*, 5 Den. 9.)

William Travers Jerome, District Attorney (*Robert C. Taylor* of counsel), for respondent. The court below had jurisdiction. (*People v. Wilson*, 3 Park. Cr. Rep. 199; L. 1895, ch. 601, § 14; L. 1897, ch. 378, § 1391; L. 1901, ch. 466, § 1405; *Stryker v. Mayor*, 19 Johns. 179; *A. D. Co. v. City of Brooklyn*, 3 Keyes, 444; *Luke v. City of Brooklyn*, 43 Barb. 54; *Udall v. City of Brooklyn*, 19 Johns. 175; *Matter of Furman Street*, 17 Wend. 649; *People ex rel. v. Assessors*, 47 Hun, 383; *Orr v. Mayor, etc.*, 36 N. Y. 661; *People v. Welsh*, 141 N. Y. 266; *People v. Pugh*, 167 N. Y. 524; *People v. Gumaer*, 80 Hun, 78.) Section 343 of the charter of the city of New York is not, in terms, confined to boilers on land. (*People v. Cannon*, 63 Hun, 306; 139 N. Y. 32; *People v. Albertson*, 55 N. Y. 50; *Bertholf v. O'Reilly*, 74 N. Y. 516; *People v. Rathbone*, 145 N. Y. 434; *People v. Havnor*, 149 N. Y. 195; *People v. N. Y., N. H. & H. R. R. Co.*, 55 Hun, 409; *Matter of Jacobs*, 98 N. Y. 98; *People v. Deming*, 13 How. Pr. 441; *Francisco v. People*, 18 How. Pr. 475; *People v. Sperry*, 50 Barb. 170.) The question of constitutionality is not raised by the record. (*Delaney v. Brett*, 51 N. Y. 78; *Purdy v. E. R. R. Co.*, 162 N. Y. 42.)

BARTLETT, J. This defendant was charged with unlawfully operating two steam boilers carrying over ten pounds of steam, to wit, one hundred and thirty pounds of steam, located on two scows anchored in the center of the East river opposite East 38th street in the city of New York.

It appears that a New Jersey corporation, known as the R. & G. Packard Company, under a contract with the United States government, was engaged in the removal of a small island called the "Man of War Rock," which was an obstruction to the navigation of the East river.

The defendant was in the employ of this company as a fireman, having over him an engineer in charge of these boilers.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

In the prosecution of this work these scows were anchored about one hundred feet apart, each having on board a boiler that generated steam for the purpose of rock drilling.

It was proved that the defendant was at times left in charge of one of these boilers, and that he held no certificate as required by section 343 of the present charter of the city of New York (L. 1901, ch. 466), the material portion of which reads as follows: "It shall not be lawful for any person or persons to operate or use any steam boiler to generate steam except for railway locomotive engines, and for heating purposes in private dwellings, and boilers carrying not over ten pounds of steam and not over ten horse power, or to act as engineer for such purposes in the city of New York without having a certificate of qualification therefor from practical engineers detailed as such by the police department, such certificate to be countersigned by the officer in command of the sanitary company of the police department of the city of New York *and to continue in force one year*, unless sooner revoked or suspended."

We are unable to agree with the learned counsel for the defendant and appellant that the East river at this point by error of description in the existing charter is not included within the limits of the present city of New York.

The first and second sections of the charter read together make it clear that the outlying municipalities were consolidated with the old city of New York as it existed on the first day of January, 1898.

The East river as it flows between the former cities of New York and Brooklyn was a part of the city of New York as it existed prior to the consolidation.

It follows that the Court of Special Sessions of the city of New York had jurisdiction to try this defendant, and the case must be considered on the merits.

The question presented by this appeal requires the construction of section 343 of the present charter of the city of New York and incidentally of section 342 which treats of the inspection of steam boilers and the issuing of a certificate to the effect that the boiler has been subjected to a proper test.

It appears that section 343 was in substance section 311 of the Consolidation Act which was enacted in 1882. We have here, therefore, no new power conferred upon the police department of the city of New York, but one that has existed for many years.

The question is narrowed down to the inquiry whether the steam boilers referred to in the section under consideration are those permanently located in the city of New York, or include all boilers on vessels of every description navigating the waters of the port of New York within the limits of the city of New York not embraced within the inspection laws of the United States government.

If it be true that the police department of the city of New York is possessed of any such power and rests under so great a responsibility, it does not appear by this record that it has ever been generally exercised.

Congress has enacted that all boilers on steam vessels navigating any waters of the United States, which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, or boats propelled in whole or in part by steam for navigating canals, shall be subject to inspection.

It has also provided that every vessel propelled in whole or in part by steam shall be deemed a steam vessel within the meaning of this title, and that the local inspectors shall inspect all boilers of steam vessels before the same shall be used and once at least in every year thereafter. (U. S. R. S. §§ 4399, 4400, 4418, p. 857 *et seq.*)

It thus appears that a large class of vessels navigating the waters of the port of New York, within the jurisdiction of the city of New York, are not covered by the inspection laws of the Federal government. In this class are boats propelled in whole or in part by steam for navigating the canals, and a large number of vessels which are not propelled in whole or in part by steam, but have placed upon them boilers for hoisting or other purposes. In this class are barges, dredges, ele-

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

vators and other craft which are towed from point to point as necessity requires.

It would seem that if the legislature intended to confer upon the police department of the city of New York jurisdiction over this large class of vessels that would require a thoroughly-organized and equipped force to properly discharge the duties involved, it would have provided a scheme in detail very different from the vague and general language found in the section under consideration.

An examination of section 342, providing for the inspection of boilers, aids in the construction of section 343. Section 342 provides in part as follows: "Every owner, agent or lessee of a steam boiler or boilers *in use in the City of New York* shall *annually*, and at such convenient times and in such manner and in such form as may, by rules and regulations to be made therefor by the police commissioner be provided, report to said department *the location of each steam boiler or boilers*, and thereupon, and as soon thereafter as practicable, the sanitary company, or such member or members thereof as may be competent for the duty herein described, and may be detailed for such duty by the police commissioner shall proceed to inspect such steam boilers, and all apparatus and appliances connected therewith."

This section evidently contemplates the inspection of such steam boilers as are permanently in use in the city of New York, and provides that the location of each boiler shall be ascertained and thereafter they shall be annually inspected.

In view of these provisions we turn to section 343, under which this defendant has been convicted, and find the provisions as to the issuing of certificates to engineers who are qualified to operate steam boilers in the city of New York. Neither of these sections contains specific language that indicates the clear intention of covering boilers afloat on vessels navigating the waters of the port of New York that may be here to-day and away to-morrow.

It is argued that a large number of boilers located on vessels in the port of New York, not covered by the United

States inspection laws, should be subject to annual inspection, and the engineers operating the same required to hold certificates as to their proper qualifications. Neither the record nor the briefs of counsel contain any information as to existing laws of the state or the United States, if any there are, in regard to this class of boilers.

We are of opinion that the defendant, in operating these boilers in the middle of the East river within the waters of the port of New York, under the circumstances disclosed, while in the employ of a New Jersey corporation, having its plant temporarily here for the purpose of performing a contract into which it had entered with the United States government, was not liable to arrest under section 343 of the present charter of the city of New York, he not having a certificate as to his qualifications issued by the police department of said city.

The questions presented by this appeal are by no means free from difficulty and call for the construction of a statute which is both general and obscure. The situation requires the prompt attention of the legislature.

The judgments of the Court of Special Sessions of the first division of the city of New York and of the Appellate Division affirming the same should be reversed.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, VANN and CULLEN, JJ., concur.

Judgment reversed and defendant ordered discharged.

HOWARD A. HAMILTON, Respondent, v. THE CITY OF BUFFALO
Appellant.

MUNICIPAL CORPORATION — SLIGHT DEFECT IN CROSSWALK — EXEMPTION FROM LIABILITY. A municipal corporation is not chargeable with negligence when an accident happens to a traveler by reason of a slight defect in a street from which danger was not reasonably to be anticipated as likely to happen, such as a rounded depression in a flagged sidewalk about four inches deep, thirty-four inches long and about twelve inches wide, caused by the wheels of heavily-laden trucks which had worn off the corners of two of the flagstones where they came together, upon the edge of which depression he stepped, his foot slipping in, causing him to

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

fall, and which had existed for a period of from six to twelve months, and was so slight as not to suggest to the mind of an ordinarily careful and prudent man that it was dangerous.

Hamilton v. City of Buffalo, 55 App. Div. 423, reversed.

(Argued December 9, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 30, 1900, reversing a judgment in favor of defendant, entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles L. Feldman, Corporation Counsel (*Edward L. Jung* of counsel), for appellant. No negligence of the defendant causing or contributing to the plaintiff's injury was shown. (*Beltz v. City of Yonkers*, 148 N. Y. 67; *Taylor v. City of Yonkers*, 105 N. Y. 202; *Ring v. City of Cohoes*, 77 N. Y. 83; *Searles v. M. R. Co.*, 101 N. Y. 661.)

John Cunneen for respondent. The injury was caused by the negligence of defendant. (*Ring v. City of Cohoes*, 77 N. Y. 88; *Phillips v. N. Y. C. & H. R. R. Co.*, 127 N. Y. 657; *Leeds v. N. Y. T. Co.*, 64 App. Div. 484; *Porcella v. M. R. F. L. Assn.*, 50 App. Div. 158.)

HAIGHT, J. This action was brought to recover damages for injuries sustained by the plaintiff in falling upon a crosswalk in the city of Buffalo. At about half-past 10 o'clock in the forenoon of the 26th day of February, 1898, the plaintiff was walking along Erie street upon the crosswalk over the Terrace to his place of business at the corner of Erie street and the Terrace. When he arrived within six or seven feet of the curb or gutter along the westerly side of the Terrace he stepped upon the edge of a hole or depression in the pavement; his foot slipped in, his ankle turned and he fell upon it, causing the injury for which this action was brought. There had been a slight fall of snow and the crosswalk was

slippery. The Terrace was a street paved with Medina sandstone and the crosswalk consisted of two or three tiers of flagging stone laid in the pavement across the street nearly upon a level with the pavement. The hole or depression appears to have been formed by the wheels of heavily laden trucks which had worn off the corners of two of the flagstones where they came together, causing a rounded depression in the flagstones extending into the first tier of flagging for a distance of eight or nine inches and then extended back into the pavement, making the depression thirty-four inches long, about twelve inches wide and in the form of a V. It was about four inches deep. This condition of the flagstones forming the crossing, and of the pavement abutting, had existed for a period of from six to twelve months. The plaintiff's place of business was upon the corner of these streets, but forty or fifty feet distant from the place of the accident. The plaintiff, at the time of the accident, was walking at an ordinary gait, thinking of his business, and did not notice the hole before his foot slipped into it. He had been, however, in the habit of passing over this crosswalk four or five times each day; had often noticed the depression, but testified "that this hole made no particular impression upon my mind; not any more than any other holes." At the conclusion of the plaintiff's evidence the trial court, upon the application of the city attorney, ordered a nonsuit, and the question presented for determination is as to whether the evidence of the plaintiff was sufficient to carry the question to the jury.

We are of the opinion that the nonsuit was proper. There was a depression in the pavement, and the corners of the two flagstones had been worn into by the wheels of heavy trucks, but the depression or hole, as it has been called, was so slight as not to suggest to the mind of an ordinarily careful and prudent man that it was dangerous. The authorities of a city are not required to keep the streets in an absolutely perfect condition, for this would be practically impossible. All kinds of pavements that have heretofore been discovered and used are subject to wear and some displacements when used by

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

heavily laden vehicles, and this cannot be prevented. It is the duty of the municipality to remedy defects within a reasonable time, which an ordinarily prudent man would regard as dangerous. The law imposes upon the municipality the duty of guarding against such dangers as can or ought to be anticipated or foreseen in the exercise of reasonable prudence and care, but when an accident happens by reason of some slight defect from which danger was not reasonably to be anticipated as likely to happen, it is not chargeable with negligence. As bearing upon the character of the defect, the plaintiff's own testimony is important. As we have seen, his place of business was within a few feet of the defect in the street. He was perfectly familiar with the condition of the place, having seen it several times a day as he passed to and from his place of business. He, as much as any other person in the city, was interested in having the street in front of his own premises kept in safe condition, and yet it does not appear that he ever made complaint to any city official or any other person of this defect. Indeed, he testified, as we have seen, that "it made no particular impression on my mind." Evidently it did not occur to him that it was dangerous, or that accidents were reasonably to be anticipated by its existence.

It appears to us that the case of *Beltz v. City of Yonkers* (148 N. Y. 67) is conclusive upon the question raised in this case. In that case the hole was in the center of a sidewalk instead of a crosswalk, but ordinarily a person exercises more vigilance upon a crosswalk over a street than he does upon a sidewalk where he is not called upon to watch for teams or passing vehicles. The hole in that case was occasioned by the breaking of the stone flagging, leaving a hole two and one-half inches deep and of about the same size of that in the case under consideration. The plaintiff in that case stepped into the hole and fell. In this case the plaintiff stepped upon the edge of the depression and his foot slipped in, causing him to fall. The hole in this case was a trifle deeper, but its additional depth did not affect his stepping upon the edge of the depres-

sion and slipping into it. (See, also, *Hubbell v. City of Yonkers*, 104 N. Y. 434.)

The order of the Appellate Division should be reversed and the judgment of the trial court affirmed, with costs.

VANN, J. (dissenting). If this case had been submitted to the jury, they could have found from the evidence that a wedge-shaped hole, 28 inches long, 12 inches wide and 4 inches deep, had existed for a year in a crosswalk of one of the public streets of the city of Buffalo; that the edges of the Medina flagstones bordering upon the hole were slanting and slippery, as they had been rounded by the passage of vehicles; that the plaintiff knew of the hole but did not see it at the time of the accident, as there was a covering of snow on the crosswalk and the wind had blown snow into the hole so that it was concealed; that when walking at an ordinary gait, in the daytime, thinking about his business, he stepped on the smooth, round edge of one of the flagstones contiguous to the hole, his foot turned and slipped into the hole, he stumbled, fell and sprained his ankle severely; that he did not see the hole owing to the snow, and did not know that it was just where he stepped when he was injured. One witness, a teamster, testified that he had driven into the hole with a load and it almost knocked his horse down, and another, who saw the hole a year before the accident, said that when a forward wheel went into the hole "it was liable to throw you off the wagon."

From these facts the jury could have found that the hole was the proximate cause of the injury and that the city was guilty of negligence in permitting the crosswalk to remain in such a dangerous condition for so long a period. While the plaintiff testified at one time that he did not see his foot go into the hole, but that it was his "theory" that it went in, he also swore positively on the direct, cross and re-direct examinations that his foot went into the hole. It was not necessary for him to see his foot go in, for he could testify from the sense of touch or feeling whether it went in or not.

N. Y. Rep.]

Dissenting opinion, per VANN, J.

Because we held in one case, under its peculiar facts, that a depression of two and one-half inches in a sidewalk was not dangerous, we are asked to hold in this case that a hole four inches deep in a crosswalk is safe. (*Beltz v. City of Yonkers*, 148 N. Y. 67.) The logic of the request suggests the query whether a hole six or eight inches deep is free from danger as matter of law. How deep must a hole be to present a question of fact? With what kind of a rule can the court measure it, after brushing aside trifles? It was the duty of the city to remedy such defects as a man of ordinary prudence would regard as dangerous. Can we say judicially that the natural result of stepping or slipping into a hole as deep as the one under consideration would not be a fall with physical injury as a consequence? Unless we can so declare as matter of law, a question of fact was presented for the jury as to the negligence of the defendant.

The jury could have found that the plaintiff was free from contributory negligence, for the hole was partially concealed by the snow, and he was not bound to have its precise location in mind when passing over the crosswalk. While the jury could have found that he was negligent, the evidence would not compel them to do so.

The main contention of the defendant, in its effort to sustain the nonsuit, is that the plaintiff failed to comply with chapter 572 of the Laws of 1886 and section 16 of chapter 105 of the Laws of 1891, in that he filed no notice of intention to sue with the corporation counsel of the defendant within the statutory period. The earlier statute requires notice of intention to commence an action for damages for personal injuries alleged to have been sustained by reason of the negligence of the officers of any city having fifty thousand inhabitants or over, to be filed with the counsel to the corporation "or other proper law officer thereof" within six months after such cause of action shall have accrued, or the action cannot be maintained. The later statute provides that no action to recover "any claim against the city (of Buffalo) shall be brought until the expiration of forty days after the claim shall

have been filed with the city clerk for presentation to the common council for audit, * * * and no action shall be maintained against the city for personal injury unless notice of intention to commence such action shall have been filed with the corporation counsel within six months after such cause of action shall have accrued."

It appeared upon the trial that the plaintiff filed a verified claim in due form and in due time with the city clerk, who reported it to the board of aldermen and it was referred to a committee. One month later an assistant of the corporation counsel, who had charge of the claim, conferred with the plaintiff's attorney concerning it, examined the plaintiff and his physician under oath, as permitted by the city charter, and in reply to a request for settlement informed said attorney that he might wait before he took any further proceedings and he would submit the facts to the authorities and let him know. Nearly two months later the plaintiff's attorney saw the assistant corporation counsel, who still had charge of the claim, and asked him if he had heard anything and he replied: "Yes, there is no chance. They have refused the claim. * * * You need not file any notice. There will be no settlement in the case, so that you may as well commence the action at once." The plaintiff's attorney, owing to this statement, filed no notice of intention to sue, and it was not until after all this had occurred that the action was commenced.

The assistant of the corporation counsel in charge of the claim had power to waive the service of notice of intention to sue and the evidence would warrant a jury in finding that he did so. The notice affected the remedy only and was merely a method of practice provided for the benefit of the city, which could be waived by it, or by its corporation counsel, or by any "other proper law officer" of the city, such as the assistant corporation counsel, to whom charge of the claim had been committed. There was no waiver of anything which affected the cause of action, as such, but simply of a form of procedure, the object of which, as we have held,

was to seasonably inform the counsel of the corporation of the claim which was to be sued upon in order that it might be immediately investigated and properly defended. (*Misano v. Mayor, etc., of N. Y.*, 160 N. Y. 123. See, also, *Sheehy v. City of New York*, 160 N. Y. 139; *Sprague v. City of Rochester*, 159 N. Y. 20.) No further discussion is necessary in view of the prevailing opinion below.

I think that the judgment entered upon the nonsuit was properly reversed and that the order of the Appellate Division should be affirmed and judgment rendered against the defendant upon its stipulation, with costs.

PARKER, Ch. J., GRAY, O'BRIEN and CULLEN, JJ., concur with HAIGHT, J.; BARTLETT, J., concurs with VANN, J.

Order reversed, etc.

EDWARD JOHNSON, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

NEGLIGENCE — INJURY TO ONE STEALING RIDE UPON RAILROAD TRAIN. A railroad company owes no duty to one stealing a ride upon one of its trains except to refrain from wantonly or unnecessarily injuring him, and where in an action of negligence brought against it by the trespasser for injuries alleged to have been received in being kicked off from the train there is no evidence upon which the jury could find that the defendant's servants or any of them assaulted the plaintiff and inflicted the injury, a judgment entered upon a verdict in his favor must be reversed.

Johnson v. N. Y. C. & H. R. R. R. Co., 86 App. Div. 617, reversed.

(Argued December 11, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 22, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William P. Rudd for appellant. The plaintiff was a trespasser and a violator of the law, was not entitled to protection from defendant, and the burden is upon him to show affirmatively that the injury came through the malicious act of defendant's servant, acting within the scope of his employment. (Penal Code, § 426; *Hoffman v. R. R. Co.*, 87 N. Y. 25; *Clark v. R. R. Co.*, 40 Hun, 605; *Mott v. Ice Co.*, 73 N. Y. 547; *Searles v. Ry. Co.*, 101 N. Y. 661; Thompson on Neg. §§ 3168, 3305; *Edison v. Barton*, 154 N. Y. 217; *Fejdowski v. D. & H. Co.*, 168 N. Y. 500; *Cadwell v. Arnheim*, 152 N. Y. 190; *Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; *Pollock v. Pollock*, 71 N. Y. 137; *Pauley v. S. G. & L. Co.*, 131 N. Y. 90.) A refusal by the court to set aside the verdict as contrary to the evidence was reversible error. (*People v. Glasgow*, 30 App. Div. 96; *Williams v. D., L. & W. R. R. Co.*, 155 N. Y. 158; *Doyle v. Albany Ry.*, 32 App. Div. 87.)

Peter A. Delaney and *Joseph A. Murphy* for respondent. It will not be presumed that the man who kicked plaintiff from the moving train was a mere trespasser or volunteer. (*Svenson v. A. M. S. S. Co.*, 57 N. Y. 108.) The motion for nonsuit was properly denied. (*Fealey v. Bull*, 163 N. Y. 397; *McDonald v. M. S. R. Co.*, 167 N. Y. 66; *Volkmar v. M. R. Co.*, 134 N. Y. 422.) Defendant is liable for the act of its servant in kicking plaintiff from its train. (*Hoffman v. N. Y. C. & H. R. R. R. Co.*, 87 N. Y. 25; *Lang v. N. Y., L. E. & W. R. R. Co.*, 80 Hun, 275; *Clark v. N. Y., L. E. & W. R. R. Co.*, 40 Hun, 605; 113 N. Y. 670; *Girvin v. N. Y. C. & H. R. R. R. Co.*, 52 App. Div. 562; 166 N. Y. 289.) The plaintiff, though a trespasser, did not forfeit all his rights. (*Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129.)

O'BRIEN, J. The plaintiff recovered a verdict of \$4,000 damages resulting, as he claims, from a personal injury produced by the defendant's negligence. The learned court

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

below affirmed the judgment entered upon the verdict, but since the decision was by a divided court the appeal presents the question whether there was any evidence for the jury which supports or tends to sustain the verdict.

The plaintiff was not a passenger nor an employee, but in the language of the record was "stealing a ride" from New York to Rochester. He did not get onto the train at the New York station, but going outside went up the street to the second bridge north of the station, climbed the fence, got on the tracks, and when the train going north came to a stop at that point he got on the front platform of the third car from the engine, which was the baggage car, and sat down in the doorway. The train started and he sat there for nearly five hours until the train reached Rensselaer, opposite Albany, and there the plaintiff met with the accident or injury resulting in the loss of his arm, to recover for which the action was brought. The plaintiff undertook the journey in the manner stated on the night of the 23rd of March, 1900, leaving New York shortly after nine o'clock and arriving at Rensselaer about two o'clock the next morning. These facts are all stated by the plaintiff himself, who was the principal witness at the trial, and as to the accident the only witness. He says that as the train was approaching the bridge over the Hudson river at Albany it slowed up, and when it was quite dark he saw a man running alongside the train which was moving at a speed that the plaintiff described as slow and the defendant's witnesses as fast. The plaintiff describes the man as dressed like a railroad man, with the coat and cap usually worn by trainmen, carrying a lantern, and after running along with the train towards the engine for some minutes he returned and was proceeding towards the rear of the train when he discovered the plaintiff still sitting in the front doorway of the baggage car. He got onto the platform with the train in motion, asked plaintiff what he was doing there, and then kicked him off the car with one kick, and the plaintiff falling off, his arm was crushed under the moving train and the injury complained of was the result. The plaintiff says he

was kicked off on the left side of the train, though when found a few minutes later he was on the right of the track on a six-foot space between tracks.

The plaintiff was not familiar with the locality, and hence might well be honestly mistaken with respect to surrounding objects and as to whether he was kicked off on the right or left of the train. In whatever way the injury was inflicted it is quite certain that it occurred at the point where he was found by the operatives of the yard and taken to the hospital in Albany. The question in the case is whether there is any proof that he was kicked off at all. The plaintiff was concededly a trespasser, and the defendant owed him no duty, except to refrain from wantonly or unnecessarily injuring him. The theory of the action is that the plaintiff being on the front platform of the baggage car, sitting in the doorway, was unnecessarily and wantonly assaulted by one of the defendant's servants, resulting in the injury complained of. This allegation is put in issue by the answer, and the plaintiff was bound to prove it. It is not claimed by the plaintiff that he knew the man who thus assaulted him. All he professed to know about him was that he was dressed as described, had the lantern and was running ahead towards the engine and had a "sandy mustache." On the part of the defendant every operative on the train and every man who had anything to do with the management or operation of it, from the highest to the lowest, was sworn, and they all testified in the clearest terms that they never touched the plaintiff or even knew that he was on the train at all. The place where the plaintiff was upon the baggage car was favorable for concealment, since the only two cars in front were the express cars that were always kept locked, and the baggage car was cut off from any connection with the rest of the train by the piles of baggage with which it was filled. This accounts for the fact that he made the journey unobserved. The plaintiff did not attempt to identify any of the operatives of the train as the person who assaulted him, nor was it even shown or claimed that any of them had at the time of the injury or at any time a sandy

mustache, or that any of them from the color of the hair or the general complexion could have produced one at the time.

If the positive evidence of all the operatives on the train on the night in question stands uncontradicted and unquestioned, it must be accepted as true. The jury could not reject it on the ground that they were in the employ of the defendant. (*Hull v. Littauer*, 162 N. Y. 569.) They had no legal or pecuniary interest in the controversy. What the plaintiff testified to was in no proper sense a contradiction. All that the plaintiff stated might be true without any impeachment of the operatives and trainmen, especially as it appears that in the same yard the operatives of the Boston and Albany railroad were to be found. The plaintiff gave no proof to show that any servant of the defendant assaulted him. In view of the positive evidence of all the defendant's servants on the train, and in the absence of any contradiction of it on the part of the plaintiff, it cannot be said that he gave any evidence in support of the issue or that the verdict is supported by any evidence. At best there was but a *scintilla*, which in law is only another way of saying that there was no evidence. (*Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356-366; *Pollock v. Pollock*, 71 id. 137, 153; *Pauley v. S. G. & L. Co.*, 131 id. 90-98; *Laidlaw v. Sage*, 158 id. 73-97; *Linkauf v. Lombard*, 137 id. 418; *Hemmens v. Nelson*, 138 id. 517-529; *Improvement Co. v. Munson*, 81 U. S. [14 Wall.] 442.) It is not necessary to refer here to that part of the argument of the learned counsel for the defendant wherein he has attempted to point out that the plaintiff's version of the transaction cannot possibly be true. It is claimed that when the plaintiff's testimony on direct and cross-examination is taken as a whole, it is so improbable and contradictory as to be incredible. We prefer, however, to place the judgment on the ground that when the proofs were all in there was no evidence upon which the jury could find that the defendant's servants, or any of them, assaulted the plaintiff and inflicted the injury, and the exception of the defendant's counsel to the submission of the case to the jury should be sustained.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., BARTLETT, HAIGHT, VANN and CULLEN, JJ., concur; GRAY, J., not sitting.

Judgment reversed, etc.

THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF
THE TOWN OF SOUTHAMPTON, Respondent, v. NATHAN C.
JESSUP, Appellant.

1. EVIDENCE — PAROL EVIDENCE INADMISSIBLE TO VARY WRITING. Parol evidence is not admissible to inject into a written contract a provision as to which the writing itself is silent.

2. TOWN OF SOUTHAMPTON. A resolution adopted by the trustees of the town of Southampton: "Resolved, that Nathan C. Jessup be and is hereby given liberty to make a roadway and to erect a bridge across the Great South Bay, commencing at the south point of Potunk Neck; thence running southerly to the beach, the said bridge to be a drawbridge of a width of not less than twenty feet, the height above the meadow three feet, and the draw to be twenty feet wide, and the said Nathan C. Jessup shall not cause any unnecessary delay to those navigating the waters of said bay." cannot be varied by parol evidence tending to show that both parties intended that the roadway should be of wood; any ambiguity arising out of the terms employed may be interpreted by such evidence; but the ambiguity must relate to a subject treated of in the writing and must arise out of words used in treating that subject; it cannot arise as to a provision concerning which the resolution itself is silent.

3. INJUNCTION. Where the grantee without permission digs earth from the lands of the grantor for the purpose of the roadway, an injunction restraining him is properly issued, since such resolution does not expressly give him that privilege and none can be implied merely from the fact that it would be convenient for him and but slightly inconvenient to the grantor if he obtained his material from such lands.

Trustees of Southampton v. Jessup, 64 App. Div. 525, modified.

(Argued December 11, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 29, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The main facts upon this appeal are substantially the same

as they appeared upon the former appeal and as stated in 162 N. Y. 122. The judgment of the trial court restrains the defendant "from digging, excavating, embanking or otherwise disturbing the lands under the waters of the Great South Bay at or adjacent to Potunk Point, described in the complaint, for the purpose of making a solid roadway or embankment, and from substituting for the wooden bridge or structure supported on piles which the defendant Nathan C. Jessup has built across said Great South Bay at or near said Potunk Point (or for any part thereof), the solid embankment of earthen materials, across, over or through said Great South Bay or any part of said bay."

The Appellate Division affirmed this judgment by a divided vote, and the defendant appealed to this court.

Charles M. Stafford for appellant. No evidence should have been received in the case except such as related to the questions left undecided by the Court of Appeals. (*Trustees, etc., v. Jessup*, 162 N. Y. 128.) Assuming that the decision of the Court of Appeals was not based solely upon the resolution, its decision is still binding on the lower court. (*Mott v. Richmeyer*, 57 N. Y. 49; *Thomas v. Scutt*, 127 N. Y. 133; *Corse v. Peck*, 102 N. Y. 513; *Bast v. Bank*, 101 U. S. 93; *Moore v. Simmons*, 133 N. Y. 695; *Myers v. Dean*, 10 Misc. Rep. 402.) No parol evidence was admissible upon the question whether the defendant had the right to make a solid roadway. The resolution is not ambiguous in that respect, and the learned trial judge erred in admitting evidence to vary its terms. (*Herrmann v. M. Ins. Co.*, 81 N. Y. 184; *Lorber v. Le Roy*, 2 Sandf. 202; *Humphreys v. N. Y., L. E. & W. R. R. Co.*, 121 N. Y. 435; *Case v. P. B. Co.*, 134 N. Y. 78; *Emmett v. Penoyer*, 151 N. Y. 564; *Hill v. H. Ins. Co.*, 10 Hun, 26; *W. R. M. Co. v. N. Mfg. Co.*, 66 Minn. 156; *Filkins v. Whyland*, 24 N. Y. 338.) The roadway was to be made by digging in the flats, as the defendant did, and using the material excavated. (*People ex rel. v. Jessup*, 160 N. Y. 253.) The lower court has entirely mistaken the effect

of the decision of the Court of Appeals, and allowed this case to be tried on an erroneous theory. (*Trustees, etc., v. Jessup*, 162 N. Y. 129.)

Thomas Young for respondent. The language of the resolution is entirely satisfied by a wooden structure supporting a roadway in the ordinary way of a bridge. (*People ex rel. v. Jessup*, 160 N. Y. 253.) Evidence was properly received to show the intent of all the parties upon a point as to which the resolution is ambiguous. (*Thomas v. Scutt*, 127 N. Y. 141; *People ex rel. v. Jessup*, 160 N. Y. 253; *Newhall v. Appleton*, 114 N. Y. 143.)

VANN, J. On the 2nd of June, 1888, the plaintiffs adopted a resolution of which the following is a copy: "Resolved: That Nathan C. Jessup be and is hereby given liberty to make a roadway and to erect a bridge across the Great South Bay, commencing at the south point of Potunk Neck; thence running southerly to the beach, the said bridge to be a drawbridge of a width of not less than twenty feet, the height above the meadow three feet, and the draw to be twenty feet wide, and the said Nathan C. Jessup shall not cause any unnecessary delay to those navigating the waters of said bay."

This resolution is now before us for the third time. On the first occasion the power of the plaintiffs to adopt the resolution was strenuously contested, but we held that through the Andros and Dongan charters they had power to authorize a riparian proprietor to construct and maintain at the locality in question such a structure as the state itself might have authorized had it, instead of the town, succeeded to the title and control of the English crown over the waters affected. (*People ex rel. Howell v. Jessup*, 160 N. Y. 249.)

On the second occasion the plaintiffs contended that the resolution conferred a revocable license only, and that it did not authorize the construction of a solid roadway and a drawbridge but simply a structure on piles with a drawbridge therein, while we held that the right created was a franchise,

N. Y. Rep.] Opinion of the Court, per VANN, J.

which empowered the defendant to make any reasonable and ordinary roadway, out of such materials as are commonly used for that purpose. We further held that the grantee waived no right by building a temporary structure in the first instance. (*Trustees of Southampton v. Jessup*, 162 N. Y. 122.)

In construing the resolution we remarked that a grant from the public, if ambiguous, should be construed in the interest of the public, but that this principle should be applied only when doubt arises, "for when the meaning is clear there is no room for construction." We then said: "The defendant was not to erect a bridge and roadway, but to *make* a roadway and *erect* a bridge. * * * In the absence of specifications in the grant, the defendant had the right to make a roadway out of the materials in common use for the construction of roads, such as earth and stone. Wood is not ordinarily used for the purpose, and the right conferred was not to build a viaduct, but make a roadway, which is generally solid from the ground up. If the plaintiffs wished to limit the defendant to a wooden structure, resting on piles, which would have been more like a bridge than a roadway, they should have said so. The resolution is silent upon the subject, for the words, 'height above the meadow three feet,' refer to the bridge, and whatever was said between the parties before it was passed, assuming it to be admissible, showed that the defendant wished to build a solid roadway on the south side such as he had already built on the north side. He applied orally to the plaintiffs for authority to build a roadway and bridge. They went over the ground with him, saw the situation, advised with the neighbors at a public meeting, and on receiving the consent of all but one out of over two hundred, granted his application, specifying the kind of bridge, but making no specification as to the roadway. There is no evidence to support the conclusion of the trial judge that it was the intention of the parties to have the roadway built of timber. * * * We think the defendant had the right to build any reasonable and ordinary roadway, such as an

embankment of earth, but whether he could dig upon the land of the plaintiffs in order to get the material is open to question, and as the matter has not been fully argued we do not now decide it. The evidence suggests, but does not show, that the earth and sand of the roadway may, unless confined in its place, ultimately wash away somewhat and result in the formation of sandbars which will obstruct navigation. We pass upon no question relating to this subject. The complaint should not be dismissed because the investigation upon the trial under review was not thorough enough to exhaust the facts and a new trial may develop a different situation in some respects."

We have made this long quotation from our previous opinion in order to show what was decided and what was reserved. It is clear that we construed the resolution and held that it authorized two different structures, to wit, a solid roadway and a drawbridge, not a bridge on piles with a drawbridge in it. We adhere to our former decision and do not wish to add further reasons for the judgment then rendered.

Upon the trial now under review parol evidence was received tending to show that both parties intended that the roadway should be of wood and although some of the trustees themselves gave evidence to the contrary, the trial judge held "that it was the intention of the parties that the defendant should have permission to build a *road-bridge* across the bay and that he has no right to build a solid roadway in any part of the bay." This evidence appears to have been received and made the basis of the present judgment, because we stated in our previous opinion that we had searched the record to see if there was any evidence, aside from the resolution itself, bearing upon the intention of the parties. We said this because the trial court had found in the record then before us "that it was the intention of said trustees and of the defendant that there should be constructed a roadway built of timber upon piles driven into the mud and water." Our object was to show that the finding was without evidence of any kind, good or bad, to support it, but not to sanction the

N. Y. Rep.] Opinion of the Court, per VANN, J.

introduction of parol testimony to add something to the resolution which the parties had failed to insert. Some evidence of this character had been received on that trial without objection and we said, *arguendo*, that even "assuming it to be admissible, (it) showed that the defendant wished to build a solid roadway on the south side, such as he had already built on the north side." Regretting that our language should have misled the courts below, we will now consider whether such evidence was admissible under the circumstances of this case.

The franchise in question is a contract in writing which cannot be varied by parol evidence, although if there is an ambiguity arising out of the terms employed such evidence may be received, not to vary the instrument, but to enable the court to appreciate the force of the words used in reducing the agreement to writing. (*Thomas v. Scutt*, 127 N. Y. 133; *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298.)

Parol evidence can neither add to nor take from the contract, but it can aid in interpreting a word or expression of ambiguous meaning by showing, through the circumstances surrounding the parties when their minds met and the language used by them at the time, the sense in which the doubtful language was employed. "It is received where doubt arises upon the face of the instrument as to its meaning, not to enable the court to hear what the parties said, but to enable it to understand what they wrote as they understood it at the time. Such evidence is explanatory and must be consistent with the terms of the contract." (*Thomas v. Scutt*, *supra*, citing *Dana v. Fiedler*, 12 N. Y. 40; *Collender v. Dinsmore*, 55 id. 202; *Newhall v. Appleton*, 114 N. Y. 140; *Smith v. Clews*, Id. 190.)

So Mr. Wharton says: "We are restricted, therefore, to the interpretation of the language used, and proof of intention is only admissible when, in cases of ambiguity, proof of intention enables us to discover what the language means. * * * The contract cannot be varied; its obscure expressions may be explained, but this is for the purpose not of moulding,

but of developing the true sense." (2 Wharton on Evidence, §§ 937, 946. See, also, 1 Greenleaf, § 275; Underhill, 323; Rice, § 170.)

What ambiguous word or expression of doubtful meaning is there in the resolution relating to the material out of which the roadway was to be constructed? None whatever, for the writing is silent upon the subject. The defendant was given liberty to make a roadway, but nothing was said as to how it should be made or what it should be made out of. An ambiguity, in order to authorize parol evidence, must relate to a subject treated of in the paper and must arise out of words used in treating that subject. Such an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful. Nothing is said in the resolution before us upon the subject of the material to be used, or the method to be employed in making the roadway, and hence there is no ambiguity arising out of the words used with reference to that subject. Witnesses cannot be permitted to swear something into the instrument, which neither explains nor interprets any language used therein. They cannot swear a wooden roadway into a franchise which is silent, even to the exclusion of implication, as to the substance out of which the roadway is to be made. That would be making a new contract instead of explaining an old one and would violate the principle upon which parol evidence is received to aid in interpreting an ambiguous word or expression. Since the plaintiffs gave the defendant the right to make a roadway, but did not restrict him to the use of wood, he was not obliged to use wood. As we held on the last appeal: "In the absence of specifications in the grant, the defendant had the right to make a roadway out of the materials in common use for the construction of roads, such as earth and stone." We think the evidence was not admissible for any purpose, and as that part of the judgment which restrains the defendant from making a solid roadway rests wholly upon this incompetent testimony, it should not be allowed to stand.

N. Y. Rep.]

Statement of case.

That part of the judgment, however, which restrains the defendant from digging upon the lands of the plaintiffs in order to obtain materials to make the roadway, does not rest upon parol evidence, but upon the resolution itself. It is not claimed that the defendant ever received permission from the plaintiffs to dig earth from their lands for the purpose of the roadway, except through the resolution. As no express permission appears therein, the only question is whether such a right may be fairly implied from the terms of the resolution. We find nothing from which such an implication can arise. It is obvious that the defendant was to furnish his own materials for the roadway the same as he was for the bridge. The fact that it would be very convenient for him and but slightly, if at all, inconvenient to the plaintiffs, if he thus obtained his materials, does not warrant the implication that they granted him the privilege. We think he had no right to dig upon their lands for that purpose.

Our conclusion is that the judgments below should be modified by striking out that part of the injunction which restrains the defendant from making a solid roadway and, that, as thus modified, they should be affirmed, without costs of this appeal to either party.

PARKER, Ch. J., GRAY and O'BRIEN, JJ., concur; BAILETT, HAIGHT and CULLEN, JJ., vote for affirmance.

Judgment accordingly.

EDWARD R. SATTERLEE, Appellant, v. ALICE L. KOBBE et al.,
Respondents, Impleaded with Others.

PARTITION — ONE CLAIMING TITLE ADVERSE AND IN HOSTILITY TO PLAINTIFF AND HIS COTENANTS MAY BE MADE A PARTY. Where the complaint in an action for the partition of lands, most of which are wild and unoccupied, alleges that the plaintiff and certain of the defendants named are the owners of all the lands as joint tenants or tenants in common; that other defendants claim some right or interest in particular lands adverse to the plaintiff and his cotenants, but that the right or interest so claimed is unknown to the plaintiff, and while it does not allege that these defendants are tenants in common with the plaintiff, it, in substance, states that

they are not, and are either in possession of certain islands or make some claim to them in hostility to the plaintiff, and such defendants answer putting in issue most if not all the allegations of the complaint, and in addition plead that they were in possession under claim of title hostile to the plaintiff, and that they or their grantors had been so in possession for more than twenty years prior to the commencement of the action, a judgment entered upon a dismissal of the complaint as to such defendants, upon the ground that they were not proper parties defendant and that the issues presented by the pleadings could not be tried in that form of action, is erroneous and must be reversed.

Satterlee v. Kobbe, 66 App. Div. 106, reversed.

(Argued December 12, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 26, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Elon R. Brown for appellant. The rule that an outstanding claim of title in a cotenant can be tried in partition is broad enough to cover the case of an outstanding adverse claim of title in a stranger. (*Weston v. Stoddard*, 137 N. Y. 119; Code Civ. Pro. §§ 1542, 1543; *Drake v. Drake*, 61 App. Div. 1.) No distinction should be made between an adverse claim of title made by a cotenant and such a claim made by a stranger. (Freeman on Partition, § 450; 3 Rumsey's Pr. 31, 41; Fiero on Spec. Act. 175, 176; *Marshall v. Crehore*, 13 Metc. 462; *Godfrey v. Godfrey*, 17 Ind. 6; *Howey v. Goings*, 13 Ill. 95; *Parker v. Kane*, 22 How. [U. S.] 17; *Cuyler v. Ferrill*, 1 Abb. [U. S. C.] 169.) An adverse claim of title by a stranger may be tried in partition. (*Weston v. Stoddard*, 137 N. Y. 125; *Best v. Zeh*, 82 Hun, 232; 146 N. Y. 363; *Ellerson v. Westcott*, 148 N. Y. 149; *Biglow v. Biglow*, 39 App. Div. 103; *Holden v. Holden*, 40 App. Div. 255; *Bender v. Terwilliger*, 48 App. Div. 371; *Drake v. Drake*, 61 App. Div. 1; *Wallace v. Curtis*, 29 Misc. Rep.

N. Y. Rep.]

Opinion of the Court, per O'BRIEN, J.

415.) Complete relief should be afforded, if the court acquires jurisdiction of the subject-matter, to avoid a multiplicity of actions. (*Sands v. Hughes*, 53 N. Y. 287; *Robinson v. Phillips*, 56 N. Y. 634; *Pope v. Hammer*, 74 N. Y. 240; *Matter of Grinnell*, 18 Alb. L. J. 75.)

Watson M. Rogers and *Horace E. Morse* for respondents. To authorize the action of partition possession, and tenancy in common, or joint tenancy, must exist. (*Florence v. Hopkins*, 46 N. Y. 182; *Sullivan v. Sullivan*, 66 N. Y. 37; *Hitchcock v. Skinner*, 1 Hoff. Ch. 21; *Beebee v. Griffing*, 14 N. Y. 235; *N. Y. C. R. R. Co. v. Brennan*, 24 App. Div. 343; *Damion v. Campion*, 24 Misc. Rep. 234; *Haskell v. Queen*, 21 N. Y. Supp. 357; *Satterlee v. Kobbe*, 39 App. Div. 420; 66 App. Div. 306; *Bullock v. Knox*, 96 Ala. 195.) The action of partition cannot be used as a pretext by which a party may have the benefits, and deprive his adversary of the advantages which obtain in an action of ejectment. (*Van Stryver v. Mulford*, 59 N. Y. 426; *Culver v. Rhodes*, 87 N. Y. 348; *Satterlee v. Kobbe*, 66 App. Div. 306; Code Civ. Pro. § 1525; *Wallace v. Swinton*, 64 N. Y. 188; *People v. Leonard*, 11 Johns. 504.) The action of partition would furnish an inadequate remedy where title and possession are in controversy. (Code Civ. Pro. § 1544.) If the admission of the complaint or the allegations of facts on the opening contain any admission fatal to the plaintiff's case, the complaint should be dismissed. (*Wilson v. P. P. Co.*, 14 Misc. Rep. 514; *Stewart v. Hamilton*, 3 Robt. 672; 18 Abb. Pr. 298.)

O'BRIEN, J. The complaint in this case states a good cause of action for the partition of lands. The lands sought to be partitioned consist of a large number of islands in the St. Lawrence river within the limits of the county of Jefferson. Most of these islands are wild and unoccupied land. According to the allegations of the complaint the plaintiff and certain of the defendants named are the owners of all the islands as

joint tenants or tenants in common. Some thirty different persons have been made defendants in the action. As to several of the defendants the complaint states that they claim some right or interest in particular islands adverse to the plaintiff and his cotenants, but that the right or interest so claimed by these defendants is unknown to the plaintiff. The complaint does not allege that these defendants are tenants in common with the plaintiff, but in substance states that they are not, and are either in possession of certain islands or make some claim to them in hostility to the plaintiff. All the defendants so affected suffered default, except four, who answered and put in issue most, if not all, the material allegations of the complaint, and in addition pleaded that they were in possession under claim of title hostile to the plaintiff, and that they or their grantors had been so in possession for more than twenty years prior to the commencement of the action. The four defendants who contest the title as to certain islands have set forth in their respective answers the grounds and nature of their claims with considerable detail, but the pleadings have been sufficiently described to show the nature of the issues presented for trial.

The case having been noticed for trial at the Special Term, the counsel for the four defendants answering moved to dismiss the complaint as to them on various grounds stated by way of argument, which, in substance, presented the objection that the complaint did not state a cause of action against the defendants who had tendered the issue with respect to the plaintiff's title. Inasmuch as the motion was made upon all the pleadings, it fairly covered the defendants' contention that they were not proper parties defendant in the action, and that the issues presented by the pleadings could not be tried in that form of action. The court granted the motion to dismiss as to the four answering defendants and the plaintiff's counsel excepted. This exception presents the only question of law involved in the case. So far as we can know from the record all the other defendants suffered default, and, therefore, we are not concerned with the rights of any of the defendants,

except the four that have answered. The precise question presented in their behalf is whether they were proper parties defendant and whether their rights and interests can be determined in the action.

It is doubtless true that during a long period in the history of our jurisprudence, while partition actions were regarded as peculiarly within the domain of equity jurisdiction, whenever it appeared that the title or right of possession of the plaintiff was disputed or that he had been actually ousted by his cotenants, courts of equity would withhold relief and remit the parties to their action at law. The principal reason for this was that there was no adequate provision for a jury trial of issues involving questions of title, but this reason has been removed by legislation embraced within the provisions of the present Code. Considering these enactments in their fair scope and meaning, they seem to permit the retention within the jurisdiction of equity of partition actions even where the question of adverse possession is involved. The statute prescribes in great detail the persons who *must* be made defendants (Code, § 1538), and further on the persons who *may* be made defendants at the election of the plaintiff. Among the latter class is mentioned a "creditor or other person having a lien or *interest* which attaches to the entire property." (§ 1540.) If the share, right or interest of a party is unknown to the plaintiff that fact must be stated in the complaint. (§ 1542.) This last provision seems to contain the clear implication that the plaintiff may join as defendants in the action persons in possession or who claim some interest the nature and character of which is unknown. It is broad enough to include intruders, trespassers or persons claiming title or some right adverse and hostile to the plaintiff. It would seem to be plain that it was intended to permit the plaintiff to join as defendants parties claiming some interest in the property although these persons might not in any legal sense be cotenants, but claiming adversely. The title or interest of any party may be put in issue by pleading and the issue tried by a jury. (§§ 1543, 1544.) Thus we see that all the obstacles

to the full and complete jurisdiction of equity in actions for partition have been swept away. In this case it has, however, been held by the learned court below that the answering defendants claiming title adverse to the plaintiff are not comprehended within the scope and meaning of the statute and were not proper parties defendant. The argument is that these defendants are entitled to have their rights determined in an action of ejectment where they could have two jury trials instead of one. The right to successive jury trials is not an absolute one, but is a matter of procedure, subject to change by the legislature, and the question is whether it has not been changed so far as these defendants are concerned.

On this question, and, indeed, upon the whole question in this case, we feel concluded by the doctrine of *Weston v. Stoddard* (137 N. Y. 119). In principle the doctrine of that case covers the whole controversy here. The discussion in that case points out the obstacles which originally existed to complete jurisdiction in equity of actions of partition where the question of adverse title was involved, and the legislation which, from time to time, was intended to remove these obstacles, and a complete review of the meaning, scope and purpose of the several provisions of the present Code. We think, in principle, that case holds that the trial court in this case had jurisdiction to hear and determine the issues presented by the answer of the defendants. It is true that in that case the parties were originally tenants in common, but it was not claimed that at the time of the commencement of the action they occupied that relation to each other. Indeed, one or more of the parties claimed by adverse title arising from the fact that they had been in undisputed and hostile possession of the premises for more than twenty years. Prescription and adverse possession is in and of itself a method of obtaining title to real property. (*Baker v. Oakwood*, 123 N. Y. 16.) When a person originally a tenant in common renounces and throws off that relation and assumes that of an owner by adverse possession or prescription, he assumes the attitude of a stranger to the original owners. He takes the

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

position that his possession and right of possession is under and by virtue of a hostile title acquired by himself through lapse of time. No good reason is apparent why the rights of such a person may be determined in a partition action, while the rights and interests of an intruder and trespasser cannot be, but must be remanded to a court of law to the end that he may have two or more jury trials. It should also be observed that the doctrine of *Weston v. Stoddard* (*supra*) has since been applied by the Supreme Court and by this court to cases which in their facts are not distinguishable from the case at bar. (*Best v. Zeh*, 82 Hun, 232; *affd.* on opinion below, 146 N. Y. 363; *Ellerson v. Westcott*, 148 N. Y. 149; *Biglow v. Biglow*, 39 App. Div. 103; *Holder v. Holder*, 40 id. 255; *Bender v. Ternwilliger*, 48 id. 371; *Drake v. Drake*, 61 id. 1.) A court of equity having once obtained jurisdiction of the parties and the subject-matter of the action will retain it and adapt the relief to the exigencies of the case. It may order a sum of money to be paid to the plaintiff and give him a personal judgment therefor when that form of relief becomes necessary in order to prevent a failure of justice and when it is for any reason impracticable to grant the specific relief demanded. (*Valentine v. Richardt*, 126 N. Y. 272.) The prevention of a multiplicity of suits is also a ground for the exercise of equity jurisdiction. It seems to us, therefore, that upon principle, as well as upon authority, the plaintiff was entitled to have the questions touching the title, possession or right of possession of the land sought to be partitioned determined in the action which he brought for that purpose.

The main argument against this view is that the defendants who have answered are thus deprived of their right to have their interests in the islands which they claim determined in a particular form of action, that is to say, in an action of ejectment, or, as it is now called, an action for the recovery of real property. It is said that in such an action they would be entitled, if defeated on the first trial, to a second trial by jury, and, in the discretion of the court, to a third trial. But

there is just as much reason for a person originally a tenant in common who has renounced his relation and claims under a hostile title to invoke that argument. It is certainly as strong in his mouth as in that of a stranger, but the contention of such a party was clearly rejected by the discussion in *Weston v. Stoddard*. It should be observed also that all questions of title to land are not determined in actions of ejectment. An action of trespass may, in some cases, determine the question of title quite as effectually as an action of ejectment, and yet the parties are not entitled to successive trials in such a case.

Moreover, it is not easy to see how these defendants will be at all prejudiced by having their rights transferred from a court of law to a court of equity. It may be that they will lose the right to two jury trials, but it is by no means certain that they will not gain more in equity than at law. They are now in a court with broad and elastic powers, and superadded to that is the right of trial by jury. Certainly no better machinery has ever been devised by human wisdom for the protection of property rights. There are some important advantages that these defendants may have in a court of equity that they would not have in a court of law in an action of ejectment. In a partition action the court will always adjust equities between tenants in common arising out of expenditures and improvements made by one of them as against the other (*Ford v. Knapp*, 102 N. Y. 135), and if it may adjust such equities in an action of partition, no good reason is apparent why it should not adjust similar equities in behalf of a person setting up an adverse possession and having made improvements upon a part of the property in reliance upon his having a good title, although such title may be in fact defective. Assuming, for the sake of the argument, that the answering defendants have not been in possession for a period of time long enough to bar the plaintiff, but have been in such possession for a period less than twenty years, and during that time have occupied and possessed the property and made valuable improvements thereon, it may be that

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

the defendants would be able to prove upon the trial a state of facts that would require a court of equity to grant them relief or compensation for their improvements. This suggestion would be strengthened very much if it should appear that the plaintiff or the true owners looked on all the time without making any objection while the persons in possession under claim of title were expending their money in such improvements. Since the complaint in this case was dismissed upon the trial without taking any proof, we cannot know what the real facts in regard to the defendants' possession may turn out to be. Relief, such as is here suggested, is administered, not upon the ground that the party making the improvement without the agreement or assent of the owner gains a lien upon the property for his advances, but it rests upon the proposition that one who seeks equity must do equity, and that the tenant out of the actual occupation who asks a court of equity to award him partition is entitled to relief only upon condition that the equitable rights of his cotenants shall be respected. This is substantially the language of Judge FINCH in *Ford v. Knapp* (*supra*). The same principle has been extended to cases where a party, not a tenant in common, but who has in good faith made improvements on property which he honestly supposed to belong to him. Such a case was *Thomas v. Evans* (105 N. Y. 601), where the doctrine was enunciated: "When a person in peaceable possession under a claim of lawful title, but really under a defective title, has, in good faith, made permanent improvements, the true owner who seeks the aid of equity to establish his own title will be compelled to reimburse the occupant for his expenditure." (*Putnam v. Ritchie*, 6 Paige, 390; *Mickles v. Dillaye*, 17 N. Y. 86; *Miner v. Beekman*, 50 N. Y. 339.) If the defendants should be able to prove facts at the trial sufficient to bring their case within these principles, they would be entitled to a measure of relief in equity that would be denied to them at law, and so would be actually benefited by the present form of action instead of subjected to any disadvantage, hardship or loss.

It is quite certain that the right to try an adverse claim of title by a defendant in an action of partition was asserted and decided by this court in *Weston v. Stoddard*. That general principle being firmly established, it is difficult to see how it is at all material who asserts the adverse right. What difference does it make with respect to the application of the rule whether the party asserting the adverse right was originally a cotenant who has renounced or thrown off that relation and assumed a hostile attitude, claiming under some other right or title, or a mere intruder or trespasser, or person claiming under such a title? It cannot be that the adverse claim of a defendant that originated without right is more sacred than that of a party who concededly always had some title and right to the possession. If an adverse title claimed by the latter can be determined in an action of partition what reasonable ground is there for the contention that a similar claim by the former cannot be? Rules of procedure by means of which property rights are determined should, whenever practicable, be consistent, simple and uniform. They certainly should not be arbitrarily construed so as to give to an intruder upon lands greater advantages of defense or offense than the true owner, and such is the spirit of the decision of *Weston v. Stoddard*. But if there ever was any doubt about the true scope and meaning of that decision, or if it was ever open to the distinction made by the learned court below in this case, it was made very plain when this court affirmed the case of *Best v. Zeh* (*supra*) on the opinion below. (146 N. Y. 363.) The decision in that case was based upon the doctrine of *Weston v. Stoddard*, and this court in approving of the opinion below certainly could not have failed to observe the broad general language employed in the concluding part of the opinion to the effect that under the present Code provisions all persons having or claiming to have an interest in the real estate sought to be partitioned may be made defendants in the action, and that adverse conflicting claims by any defendant may be determined under the procedure there enacted, to the end that when the real estate involved is

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

divided or sold all clouds upon the title may be removed and the title settled by the judgment. That is practically what is sought to be accomplished in this case. In the case of *Ellerson v. Westcott* (148 N. Y. 155) Judge ANDREWS stated that the scope of partition actions had been greatly enlarged by recent legislation, but it has not been very much enlarged if it be true, as asserted by the learned counsel for the defendants, that a trespasser in possession of some part of the land sought to be partitioned, or a defendant claiming under some title originating in a trespass, can oust the court of jurisdiction by simply alleging in the answer that he holds in hostility to the plaintiff.

It will be observed that there is no express provision of the Code which in so many words confers power upon the court to determine adverse claims of title arising in actions of partition, but it is quite certain that the court has the power notwithstanding the omission to express it in terms. The only question is whether the power is conferred as to certain defendants and denied as to others. In other words, whether a distinction is to be made between defendants founded on nothing but some difference in the origin of their claims. But the Code does permit the plaintiff in partition to join as defendants persons who have or claim some unknown interest in the lands, and these words aptly describe persons in possession under claim of title originating in a trespass. It permits the defendants by pleading to contest the plaintiff's title and to introduce contests between themselves as to title, and provides that all the issues thus framed may be tried by a jury. The reasonable and necessary conclusion from all this is that the purpose of the statute was to enable parties to the action to settle all controversies as to title in one action. That is the scope and spirit of the decision in *Weston v. Stoddard*. That is the interpretation that this court and the courts below have put upon the decision as will be seen by the cases cited above and as will appear from numerous other cases not referred to. It is a rule of procedure neither harsh nor unjust in itself, but on the contrary wise and beneficent since it protects all rights,

prevents a multiplicity of suits and ends in one action litigations that formerly required many. The rule has been accepted and acted upon by the courts of original jurisdiction and by this court, and in my opinion it would not be wise to take any step backwards by introducing a distinction in the nature of a limitation upon the case of *Weston v. Stoddard*, especially as the distinction contended for has no logical or reasonable basis upon which to rest. The question discussed is raised in this case by a motion at the trial which is practically a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action against certain defendants, and for the reasons stated we think it does.

The judgment should be reversed and a new trial granted, costs to abide the event.

BARTLETT, J. (dissenting). I am unable to vote for the reversal of this judgment.

If this action of partition is permitted to stand against all the defendants named it practically obliterates the distinction between partition and ejectment.

The property set forth in the complaint involves one hundred and twenty-one islands, more or less, in the St. Lawrence river.

As to the respondent defendants, six in number, they are not tenants in common with the plaintiff, nor with each other, nor with the many other defendants joined in this action.

These respondent defendants alleged in their answers that their grantors have been and they are continuing in the exclusive and undisputed actual possession of a certain island claimed by each particular defendant respectively under a claim of title thereto, openly, notoriously, continuously and adversely to the plaintiff and to the plaintiff's alleged cotenants for more than twenty years prior to the commencement of the action.

I may suppose a case (which doubtless presents the situation

N. Y. Rep.]

Statement of case.

of one or more of these six defendants) of a defendant seized of one of these one hundred and twenty-one islands by a good title, in fee simple, and upon which he has placed a valuable house and other improvements for a summer residence. Is it possible that he can be compelled to answer in a partition suit, involving this entire group of islands, and defend his undoubted title to this one island in an action involving a multitude of issues, in which he has no interest whatever?

A litigant in the situation of this supposed defendant, standing upon an open and recorded title existing for many years, has the absolute right to defend it in an action of ejectment, unhampered by other issues and in the enjoyment of all those remedies which the law has wisely provided for the protection of title to land.

The cases cited, wherein it is claimed the issues in partition have been somewhat enlarged, have no application to this situation.

PARKER, Ch. J., HAIGHT, J. (and GRAY and CULLEN, JJ., in result), concur; BARTLETT, J., reads dissenting opinion; VANN, J., not voting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM S.	173	103
DEVERY, Appellant, v. BIRD S. COLER, as Comptroller of	1173	392
the City of New York, Respondent.		

1. CONSTITUTIONAL LAW — REORGANIZATION OF THE POLICE DEPARTMENT IN THE CITY OF NEW YORK — L. 1901, CH. 38, NOT VIOLATIVE OF § 16, ART. 3, OF STATE CONSTITUTION RELATING TO LOCAL BILLS. Chapter 38 of the Laws of 1901, abolishing the board of police commissioners and the office of chief of police of the city of New York, and imposing the duties of those offices upon a single commissioner, is not in conflict with section 16 of article 3 of the Constitution, as embracing more than one subject which is not expressed in its title, since the act embraces but one subject, viz., the reorganization of the police force of the city, and that is not only sufficiently but is elaborately expressed in the title.

2. NOT VIOLATIVE OF THE FEDERAL CONSTITUTION AS IMPAIRING THE OBLIGATION OF CONTRACTS. The act is not violative of the Federal

Constitution as impairing the obligation of a contract, in that it deprives the incumbent of the office of chief of police of his right to the pension to which he would have been entitled had he been permitted to serve as such officer for the requisite time, and which would have been paid out of a fund, a part of which was derived from deductions from his salary. (L. 1897, ch. 878, §§ 351-357.) 1. Because assuming, but not deciding, that the statutory provision for pensions constituted a contract with him, the legislature has the right to abolish the office, and as the act does not purport to abrogate his right to a pension, if he has any vested rights beyond the power of legislative interference, he may assert them in a proper proceeding. 2. Assuming, but not deciding, that the pension scheme was such that the legislature could not abolish the office without violating such contract, then the original legislation establishing the scheme was void, so far as it led to any such result, since one legislature cannot bind the hands or limit the powers of subsequent legislatures in matters that are strictly governmental, and what it cannot do directly it cannot do indirectly by authorizing the municipality to enter into any contract with an incumbent of the office which would have that effect.

People ex rel. Devery v. Coler, 71 App. Div. 584, affirmed.

(Argued November 12, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 20, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to pay to the relator the salary of chief of police of New York city for the month of February, 1901.

The facts, so far as material, are stated in the opinion.

Judson S. Landon, Abram I. Elkus and Carlisle J. Gleason for appellant. Chapter 33 of the Laws of 1901 is in direct conflict with section 1, article 1, and section 1, article 13, of the Constitution of the state of New York. (*Barker v. People*, 3 Cow. 686; *Rogers v. Common Council*, 123 N. Y. 173; *Mayor, etc., v. State*, 15 Md. 379; *People v. Hurlbut*, 24 Mich. 44; *Atty.-Gen. v. Bd. of Councilmen*, 58 Mich. 213; 1 Story on Const. § 628; *Taylor v. Porter*, 4 Hill, 140; *White v. White*, 5 Barb. 474; *People v. Toynbee*, 20 Barb. 198; *Rathbone v. Wirth*, 150 N. Y. 459.) The act is in direct conflict with section 2 of article 10 of the Constitution. (*Rath-*

N. Y. Rep.]

Points of counsel.

bone v. Wirth, 150 N. Y. 459; *People ex rel. v. Howland*, 155 N. Y. 270; *People v. Draper*, 15 N. Y. 532, 544; *People ex rel. v. McKinney*, 52 N. Y. 374; *People ex rel. v. Albertson*, 55 N. Y. 50; *People ex rel. v. Mosher*, 163 N. Y. 32.) The act is in direct conflict with section 6 of article 1 of the Constitution. (L. 1897, ch. 378, §§ 351-357; *Dale v. Governor*, 3 Stew. 387; *Comrs. v. Hudson*, 20 Kan. 71; 45 N. H. 593; *Chalk v. Darden*, 47 Tex. 438; *U. S. v. Teller*, 107 U. S. 64; *Frisbee v. U. S.*, 157 U. S. 160; *Freligh v. Matsell*, 94 N. Y. 179; *Pennie v. Reis*, 80 Cal. 226; *People ex rel. v. Angle*, 109 N. Y. 564; *Allen v. Stevens*, 161 N. Y. 122; *People ex rel. v. Bd. of Suprs.*, 4 Barb. 64.) The act in question is in direct conflict with section 16 of article 3 of the State Constitution. (*People v. O'Brien*, 48 N. Y. 193.) To save any part of the act, it must clearly appear that in no degree was the bad part an inducement to the passage of the other part, and that its elimination in no way changes the intended effect of what remains. (*Warren v. Mayer*, 2 Grey, 84; *Allen v. Louisiana*, 103 U. S. 80; *Jones v. Jones*, 104 N. Y. 234; *People ex rel. v. Spicer*, 99 N. Y. 225.)

George L. Rives, Corporation Counsel (*Theodore Connolly and Terence Farley* of counsel), for respondent. Chapter 33 of the Laws of 1901 does not violate the provisions of either section 2 or section 3 of article 10 of the State Constitution. (*People ex rel. v. Albertson*, 55 N. Y. 50; *People ex rel. v. Sturgis*, 27 App. Div. 387; 156 N. Y. 580; *People ex rel. v. Mosher*, 163 N. Y. 32; *Matter of Brenner*, 67 App. Div. 375; 170 N. Y. 185; *Matter of Jarvis v. Waterbury*, 84 Hun, 462; *Bergen v. Powell*, 94 N. Y. 591.) That part of the statute which confers upon the governor the power to remove the police commissioner may be eliminated from the act without in any way impairing its general scheme or effect. (*People ex rel. v. Briggs*, 50 N. Y. 553; *Matter of Van Antwerp*, 56 N. Y. 261; *Demarest v. New York*, 74 N. Y. 161; *Matter of M. G. L. Co.*, 85 N. Y. 526; *Duryee v. New York*, 96 N. Y. 477; *Bohmer v. Haffen*, 161 N. Y. 390;

Matter of Fuller, 62 App. Div. 428.) The act in question does not violate any of the provisions of the Federal Constitution. (*Dartmouth College v. Woodward*, 4 Wheat. 518; *Ex parte Hennen*, 38 U. S. 230; *Butler v. Pennsylvania*, 10 How. [U. S.] 402; *Newton v. Corns.*, 100 U. S. 548; *Coulter v. Murray*, 4 Daly, 506; *People ex rel. v. Stevens*, 51 How. Pr. 103; *Connor v. Mayor, etc.*, 5 N. Y. 285; *People ex rel. v. Batchelor*, 22 N. Y. 128; *People v. Devlin*, 33 N. Y. 269; *People ex rel. v. Roper*, 35 N. Y. 639.) A pension fund for the benefit of the members of the police force is a public fund, subject to legislative control, and a member of the force has no vested interest in it which cannot be taken away by the legislature before the right to the pension accrues. (*Pennie v. Reis*, 80 Cal. 226; 132 U. S. 464; *Clark v. Reis*, 87 Cal. 543; *Clark v. P. & H. Ins. Board*, 123 Cal. 24; 127 Cal. 550.)

CULLEN, J. The relator was the chief of police of the city of New York as that force was organized and constituted prior to the enactment of a statute passed on February 22nd, 1901, known as chapter 33 of the laws of that year. By the first section of that act the official terms of the police commissioners then in office were abrogated, and all their powers and duties imposed on a single commissioner to be appointed within ten days after the passage of the law. By section 3 the office of chief of police of the city of New York was abolished, and his powers and duties granted to and imposed upon the police commissioner. By section 4 the commissioner was empowered to appoint a first and second deputy. Under this statute the mayor appointed a new police commissioner. The commissioner appointed the relator first deputy. The relator acted as deputy, but did not draw his salary as such. He insisted that the statute changing the organization of the police force and abolishing his office was unconstitutional and void. On this theory he contended that he was still in office as chief of police and demanded of the respondent, the comptroller of the city of New York, his

monthly salary. This demand having been refused he sought to compel payment by a writ of mandamus. The application for the writ was denied at Special Term, and its action was affirmed by the Appellate Division.

The learned counsel on both sides have waived all matters of practice and have presented to this court, as the sole question for its determination, the validity of the statute of 1901. The constitutionality of the act is challenged on several distinct grounds. The objection is made that it is in conflict with section 16, article 3 of the State Constitution, which provides: "No private or local bills, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." The law though public is doubtless local and, therefore, its enactment by the legislature fell within the restrictive provisions of the Constitution. We think it very clear that full compliance was had with the constitutional requirements. The act contains but one subject, the reorganization of the police force in the city of New York. There are various details dealt with by the statute, but they are details of the same subject. In the case of a statute providing for the original creation of a police force it would not be denied that the same act could provide for the personnel of the force, the mode of appointment and removal of the various members, the powers and functions of its officers and the control and management of the funds of the department. These would be not only proper but necessary details of the subject. In fact, the statute under which the relator held his office as chief of police not only dealt with all these matters, but with an innumerable variety of other things, for it was the Greater New York charter. Nevertheless the law contained but a single subject, the government of the city of New York. It is plain, therefore, that the statute before us contains but one subject, and the only question that can arise is whether the title is broad enough to include all the matters dealt with by the act. On this constitutional provision the general rule is: "It is sufficient if the title expresses substantially the subject. It is not necessary that the most perfect

expression should be adopted. The object of the requirement of the Constitution is that legislators and the public may be informed by the title of the general nature of the provisions proposed to be enacted, and to prevent deception." (*Matter of New York and Brooklyn Bridge*, 72 N. Y. 527.) Judged by this standard, the title of the law is not only sufficient but possibly unnecessarily elaborate. It seems to have been drawn with the constitutional provision constantly in the mind of the draughtsman and with the intention that at whatever cost of prolixity the constitutional mandate should be complied with.

The next attack on the validity of the statute is that it violates the Federal Constitution in that it impairs the obligation of a contract. At the time of its enactment the relator had been a member of the police force of the city of New York for twenty-three years. During all of this period there had existed a system of pensions for the police of the city of New York in the benefits of which the members of the force were, in certain contingencies or after certain length of service, entitled to share. This system was created by statute, and to its funds was contributed a deduction of two per cent from the salaries of the members of the police, though the fund was also largely derived from other sources. The latest provisions on the subject are contained in sections 351 to 357 of the Greater New York charter (Chap. 378, Laws of 1897). Under these the relator, if he remained chief of police, would, at the expiration of a term of twenty-five years' service, be entitled to be retired on an annual pension of three thousand dollars, and the charter provides: "Pensions granted under this section shall be for the natural life of the pensioner and shall not be revoked, repealed or diminished." The claim of the relator is that the statutory provisions for pensions out of a fund proceeding in part from deductions from his salary constituted a contract with him, the obligation of which is violated by the abolition of the office which he held, since by ceasing to be a member of the police force he loses his right or opportunity to obtain a pension. I shall not discuss the

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

question whether the pension laws constituted in any respect a contract between the state or the city and the members of the police force. It is to be borne in mind that this proceeding is not brought to enforce any right or interest of the relator to or in the pension fund, but for his salary as chief of police. Assuming for the discussion only that his right to a pension is contractual, the argument in his behalf is, substantially, that because the legislature could not deprive him of his right to a pension, and because it was necessary, in order to obtain a pension, that he should remain in office till he reached the time for retirement, therefore the legislature could not abolish his office and he is entitled to be continued in office and to receive the salary thereof until his retirement. I think the conclusion does not follow from the premise. The statute does not purport to abrogate any right of the relator to a pension. If he has vested rights beyond the power of legislative interference he may assert them in an action to recover his pension or for damages. Even in the case of private persons a master may discharge his servant, though in violation of his contract to employ the latter for a definite term. The servant cannot insist that he shall continue in the master's employ, but the master remains liable to the servant for damages for his breach of contract. Practically the relator is here insisting on the specific performance of what he claims was his contract with the city of New York entered into under legislative sanction. But there is no right to the specific performance of such a contract and a law which prohibits or renders impossible the specific performance does not impair the obligation of the contract. This is clearly pointed out by the late Justice MILLER of the Supreme Court of the United States in his lectures on the Federal Constitution (p. 541): "It is needless here to advert to the difference between specific performance and damages for non-performance. In a very limited class of cases only are contracts capable of being specifically performed by the court, such as the conveyance of real estate, and some others, where the judicial power can take hold of a man and compel him to do

what he has promised. In much the larger number of cases at law the remedy is by way of damages in a money judgment for not performing the thing promised. *A state statute or law that impairs the obligation of a contract must be one which takes away the remedy for its violation.*" There is no claim made that the relator's right to the statutory compensation while in office prior to retirement is contractual and beyond the power of the legislature to alter or take away. The authorities are conclusive to the contrary of such a doctrine. (*Conner v. Mayor etc. of N. Y.*, 5 N. Y. 285; *Butler v. Penn.*, 10 How. [U. S.] 402; *Mechem Public Officers*, sec. 857.) The relator's position is not that the salary could not be taken away from him, but that he could not be deprived of the office, and his claim to the salary is the mere incident of his claim to the office.

There is a further answer to the relator's claim. If we assume that the relator's right to a pension is contractual and also assume that the pension scheme was such that it was not possible for the legislature to subsequently abolish the relator's office without violating that contract, does it follow that the statute now before us is void as contravening the Federal Constitution? Not at all. All this would simply prove that the original legislation establishing the pension scheme was void so far as it led to any such result. Nothing is better settled in our jurisprudence than that one legislature cannot bind the hands or limit the power of subsequent legislatures. (*Cooley Const. Lim.* p. 125.) The exception to this doctrine is where the legislative act is the grant of some property right which may not thereafter be recalled, but in matters that are strictly governmental the rule is absolute. It is plain that the regulation of the administration of a city, the determination of the number, character, power and authority of its officers and the duration of their terms is governmental in the highest degree. "A municipal corporation is a part of the governmental machinery of the state, organized not for the purpose of private gain, like private corporations, but for the purpose of exercising certain

functions of government within a specified locality; and it possesses such powers, and such only as are conferred upon it by the legislature; and they are to be exercised in such form, mode and manner, and by such agencies as the legislature shall from time to time prescribe, within the limits of the Constitution. * * * over all its civil, political or governmental powers the legislature is, in the nature of things, supreme and without limitation, unless restrained by the Constitution." (*People ex rel. City of Rochester v. Briggs*, 50 N. Y. 553.) No one would assert that one legislature by a provision to that effect in a statute creating an office could deprive its successors of the power to abolish the office or change its term. If a legislature has no such power to directly limit subsequent legislation it cannot do so indirectly by authorizing the municipality to enter into any contract with an incumbent of the office. The decisions of the Supreme Court of the United States are conclusive on this question. In *Stone v. Mississippi* (101 U. S. 814) the legislature in consideration of the immediate payment of a specified sum and the annual payment of a further sum and a percentage of receipts from the sale of tickets chartered a company and authorized it to maintain a lottery. Subsequently the Constitution of the state provided that no lotteries should be authorized or permitted to be drawn within the limits of the state. It was contended for the company that the constitutional provision could not impair its chartered rights. The general doctrine was conceded by the court, but it was held through Chief Justice WAITE that the doctrine did not apply to the exercise of governmental functions. It was there said, approving an opinion of this court: "All agree that the legislature cannot bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State, but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.' (*Met. Board of Excise v. Barrie*, 34 N. Y. 657.) * * * The question is, therefore, directly

presented whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. * * * *But the power of governing is a trust committed by the people to the government, no part of which can be granted away.*"

We are now brought to the consideration of the most serious questions involved in this case. Section 2 of the statute provides that the commissioner shall, unless removed, hold office for the term of five years. It is further provided that "The said commissioner may, whenever in the judgment of the mayor of said city or the governor the public interests shall so require, be removed from office by either, and shall be ineligible for reappointment thereto." Similar provision is made for the removal of his successor or successors. It is contended by the learned counsel for the relator that these provisions are in conflict with the Constitution of the state in several respects. It is urged, *first*, that they violate section 2 of article 10, which provides: "All city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose;" and, *second*, that they violate the provisions of section 1, article 1 of the Constitution, that "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers;" and of section 1 of article 13, which provides: "No other oath, declaration or test (than the constitutional oath prescribed by this section) shall be required as a qualification for any office of public trust." Before discussing these objections in detail it may be proper to first dispose of the answer made to this contention in the learned opinion of the majority of the court

below. It is there said: "It is settled beyond dispute that the legislature has power to abolish an office or to terminate the term of a city officer who holds his office under legislative sanction. If the legislature had the power to remove from office a police commissioner appointed by the mayor of the city of New York, I cannot see that it is a violation of this provision of the Constitution to authorize the governor to exercise that power. It certainly is no greater restriction upon the power of appointment for the governor to remove an officer appointed by the mayor of a city than it is for the legislature by a direct enactment to remove such an officer." This argument is based on what I consider a radical misconception of the nature of the action of the legislature when it deprives an incumbent of his office by abolishing the office or terminating his term. In such cases the officer is popularly said to be "legislated" out of office. This colloquial term expresses with the precision of the logician the character of the removal; it is legislation. While the result of such action is that the incumbent is ousted from his office, this result is accomplished, not by striking directly at the officer, but by striking at the office, for in its power to make laws the legislature is authorized to create or abolish offices and to fix official terms. It is a settled maxim of constitutional law that the law-making power of the legislature cannot be delegated by that body. (Cooley Const. Lim. p. 117; *Barto v. Himrod*, 8 N. Y. 483.) Therefore, the fact that the legislature may in the method described oust an incumbent from his office does not at all tend to prove that as a result of such power it may authorize some other officer to remove him from office.

But as already quoted from the opinion of Chief Judge CHURCH in *People ex rel. City of Rochester v. Briggs*: "Over all its (a municipal corporation's) civil, political or governmental powers the legislature is, in the nature of things, supreme and without limitation, unless restrained by the Constitution." Therefore, if there were no constitutional limitations the legislature might provide for the removal of an officer as it might provide for his appointment. There is, however, the express

constitutional requirement that city officers if appointed must be appointed by such authorities of the city as the legislature may designate. That the police commissioner is a city officer cannot under the authorities be denied. In the famous Metropolitan Police case (*People ex rel. Wood v. Draper*, 15 N. Y. 532) the power of the legislature to authorize the governor to appoint police commissioners for a district composed of several counties was upheld, but on the sole ground that the commissioners were not officers of the city, but of the district. Discussing the question of what offices are local, Judge DENIO, writing the prevailing opinion, said: "Hence it follows that if the provisions of the statute had been limited territorially to the city of New York, it would have been in conflict with the section of the Constitution so often referred to." The same proposition was decided by this court in *People ex rel. Bolton v. Albertson* (55 N. Y. 50) and in *Rathbone v. Wirth* (150 N. Y. 459), and there is no decision to the contrary. There being no express provision of the Constitution prohibiting removal from office, but the commissioner being a local officer and required by the Constitution to be appointed by some of the local authorities, the question finally presented to us for determination is this: Is an unqualified and absolute power of removal vested in one officer inconsistent with the exercise of the power of appointment by another officer? I think it is. It is to be first observed that the question would not arise were the power of removal granted to another local officer, for the legislature is not restricted in the selection of the local authorities on which it may confer the power of appointment. Therefore, if the power were given to one local authority to appoint and to another local authority to remove, there would be no constitutional objection to such a statute, for the legislature has the power to make the concurrent action of both local authorities necessary for appointment. In the case before us, however, the power of removal is given to the governor of the state on whom, if the office is a local one, unquestionably the power of appointment cannot be conferred.

Since the adoption of the Constitution of 1846, which first contained this provision as to the election or appointment of local officers, no constitutional question has been so frequently before this and the other courts of the state as the extent and effect of these limitations. The decisions are so numerous that even a cursory review of them would exceed the limits of a judicial opinion. There is substantial agreement in all the authorities on the propositions that the object of the constitutional provision was to secure to the electors in localities the selection and choice of their local officers, either immediately by election or mediately through appointment by other local officers, and that while the power of the legislature is plenary, except when restricted by the Constitution, this latter principle is not to be so extended as to give validity to every legislative act against which there cannot be found in the Constitution an inhibition in express terms. "An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden." (ALLEN, J., *People ex rel. Bolton v. Albertson*, *supra*.) "When the main purpose of a statute, or of part of a statute, is to evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law." (VANN, J., *People ex rel. Burby v. Howland*, 155 N. Y. 270.) I think no one will deny that the provisions of the Constitution regulating the selection of local officers are exclusive, or the correctness of the doctrine enunciated by BROWN, J., in *People ex rel. Wood v. Draper* (*supra*), that when the Constitution "Prescribes a mode of exercising a function of government, such as making laws, administering justice, or selecting officers, the legislature are prohibited from prescribing a different mode." (See Cooley Const. Lim. p. 64, and cases there cited.) It was on this ground that the decision in

Barto v. Himrod (*supra*) proceeded, the court holding that the Constitution having vested the legislative power in the legislature it excluded the people themselves from enacting a law, though the law was submitted to them for action thereon by a statute passed by the legislature. "It is, of course, evident that the (constitutional) provision authorizes the legislature to confer the power of appointment upon any local authority; but that the power, which is to be thus conferred, may be qualified, or hampered in its exercise, by the legislature, is not only not evident, but such a proposition, in my opinion, threatens what we are bound to regard as a cardinal principle of our form of government." (*Rathbone v. Wirth*, 150 N. Y. 459.) Hence, the legislature could not enact that a local officer of the constitutional class should be appointed by a designated local authority and the governor or by the local authority with the consent of the governor. I think it is just this that the legislation now before us has attempted. The power to remove granted to the governor is absolute and unqualified. Under this provision of the statute, if valid, he may not only legally but justly and properly remove the incumbent from office because he deems him not to be the proper man for the place and thinks a better one could be appointed. The intent of the Constitution is that the office shall be filled by an incumbent whom the electors of the locality or their chosen officers deem the proper person to discharge its duties, regardless of the opinion of the other officers or other electors of the state on that subject. It is no answer to this to say the constitutional requirement is complied with because the officer must hold a certificate of appointment from a local authority. The Constitution deals with substance, not merely with form. When it provides that the officer shall be elected by the electors of the locality or appointed by some local authority, its mandate is that the office shall be filled and held solely by virtue of such election or appointment. An absolute power of removal in the governor is inconsistent with such a tenure. The question before us is very different from that which would be presented by a provision that the governor might

remove for misconduct in office after a notice and a hearing. The Constitution, by section 8 of article 10, provides that "The legislature may declare the cases in which any office shall be deemed vacant when no provision is made for that purpose in this Constitution." The legislature has exercised this authority by laws of a general character and enacted that the removal of the residence of a local officer without the locality for which he was elected, the conviction of an officer of a crime involving a violation of his oath of office, or his conviction of a felony of whatever character renders the office vacant. The validity of the statutory provisions has never been challenged. I am not prepared to assert that a statute authorizing the governor to remove a local officer for misconduct on charges and after a hearing could not be justified under the section of the Constitution quoted.

The proposition that the constitutional regulations as to the choice of local officers operate not merely upon the election or appointment to office, but on its tenure, seems to me to have been decided by this court in the cases of *People ex rel. Fowler v. Bull* (46 N. Y. 57) and *People ex rel. Williamson v. McKinney* (52 N. Y. 374). In the *Bull* case the defendant was elected justice of the eighth judicial district of the city of New York, which office fell within section 18, article 6, of the Constitution of 1846, which provided: "All judicial officers of cities and villages, and all such judicial officers as may be created therein by law, shall be elected at such times and in such manner as the legislature may direct." At the time of his election the term of the office had been fixed by statute at six years. In 1866 a statute was passed extending his term of office for three years. The question presented in the case was the validity of that statute. The defendant had been elected judge of the court and come into his office lawfully, and the legislature had unquestionably the power to prescribe the duration of the office. It was argued in support of the validity of the statute that thus all the constitutional requirements had been complied with. This court took a contrary view. Judge FOLGER there said: "If the

defendant were asked in the fifth or sixth year of his incumbency how he held his office, he could truthfully answer, by election by the people. If he were asked in the seventh, eighth or ninth year, and should make such answer, would it be truthful? The people could elect but by law for only six years. The six years had gone by. The people had never again elected. The defendant was still using the office. What power sustained him in the use? Could he show any save the statute of 1866?" It was held that as the legislature could not have passed an act appointing the defendant to office, it was equally precluded from extending the term of the office to which he had been legally elected. The *McKinney* case is to the same effect. In the present case if the legislature could not have prescribed that the police commissioner should be appointed by the mayor with the consent of the governor, how was it empowered to enact that he should not hold the office for a single instant after his appointment except by the sufferance and consent of the latter officer?

In my opinion the provision that renders any incumbent who may be removed from the office of police commissioner ineligible for reappointment is also unconstitutional. Doubtless the legislature may prescribe qualifications for office where there is no constitutional provision on the subject. The legislature has exercised this power in many cases and the validity of the exercise has been upheld. (*People v. Platt*, 117 N. Y. 159; *People v. Purdy*, 154 N. Y. 439.) Early in the judicial history of this state it was declared "To be entirely clear, that the legislature cannot establish arbitrary exclusions from office." (*Barker v. People*, 3 Cowen, 686.) The doctrine was recognized in *Rogers v. Common Council of Buffalo* (123 N. Y. 173) and the proposition expressly decided in *Rathbone v. Wirth* (*supra*). In the last case a statute providing that no person should be eligible to the office of police commissioner in the city of Albany unless he was a member of the political party having the highest or the next highest representation in the common council was held unconstitutional. There was a vigorous dissent in that case and opinions were written by two members

of the minority of the court. In one, Judge BARTLETT conceded the invalidity of the provision referred to, but thought it might be separated from the remainder of the statute. In the other, Judge MARRIN did not deem it necessary to decide the question. He thought that the provision might be sustained on the ground that so many acts had been passed by the legislature of a similar character that it amounted to a practical construction of the Constitution. Independent of that consideration he was inclined to the belief that the provision was invalid. From this statement it appears that the court was substantially unanimous in the proposition that arbitrary disqualifications from office are in violation of the Constitution either as infringements on the personal rights of the individual or as restraints on the choice of the electors or appointing authorities. It is entirely clear that the provision disqualifying from reappointment a police commissioner who may have been removed by the mayor or the governor is of the most arbitrary character. I believe that nothing approximating to it can be found in the history of legislation. As already said, the incumbent may be removed by the governor or by the mayor because either of the latter think that a better man for the place may be found. A removal does not involve any reflection on the official or the personal character of the officer removed. After every municipal election which results in a change of the political control of the municipality the old officials, or at least the heads of the great executive departments, are turned out and new men are appointed to office. This is true to a very large extent when there is no change in the political control of the city, but simply in the personnel of the mayor. Indeed the dominant feature of the present charter of the city of New York is the bestowal upon the mayor of the continuous and unlimited power of selection and removal of his subordinates, so that he may be held accountable to the people for the efficiency of the municipal government. The proposition that the removal of an official under such circumstances can be made to operate *per se* as a disqualification for subsequent appointment to office (for if it

can be made a disqualification for reappointment to this office it can equally be made a disqualification from holding any office which is the creation of statute or the qualifications of which are not fixed by the Constitution) is saved from being monstrous only by being ridiculous. Of course, the legislature can prescribe no such disqualification. If removal could be made only for misconduct upon charges a very different question might arise.

It has been suggested that this disqualification is analogous to that found in the Constitution in relation to the sheriff, where it is provided that that officer is ineligible for re-election to the next term. A little consideration, however, will show that the suggestion is without force. At the time when this constitutional provision was first adopted the office of sheriff was popularly believed to be much more powerful than we now regard it. It was supposed to be so powerful that the sheriff might dominate the electors of his county and secure his re-election against their unbiased will. (See Clark's Proceedings Convention of 1821 at p. 192.) It was against this evil that the Constitution sought to guard. But in the statute before us it will be observed that if the police commissioner serves out his term of five years he is entirely eligible for reappointment to the next term. If it was the fear that the officer would be so powerful as to dictate his own reappointment, then it would have been enacted that he should be ineligible for reappointment under all circumstances. Moreover, it is a little difficult to discover how a commissioner could so exert the power of his office as to secure a reappointment and yet be unable to save himself from removal. If removed by the mayor he certainly could not obtain immediate reappointment from him. If removed by the governor he could be again removed after his reappointment. There can be only one purpose of this provision, and that purpose plain, to prevent the mayor from appointing any person whom the governor might remove.

Though the provisions we have last discussed are unconstitutional, we do not think that the whole statute is, therefore,

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

rendered void. "It is a universal rule that where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void, unless the provisions are so connected together in subject-matter, meaning or purpose, that it cannot be presumed the legislature would have passed the one without the other." (*People ex rel. City of Rochester v. Briggs, supra*. See Cooley Const. Lim. p. 177.) The main feature of the statute is the abolition of the board of four commissioners and the office of chief of police, and the imposition of all the powers and duties of those officers on a single commissioner. In these respects we have held the statute valid. The validity of the power conferred upon the mayor to appoint and remove a commissioner cannot be challenged. Thus, the substantial object sought to be accomplished by the statute can be carried out. The provisions conferring upon the governor the power to remove and making the removed official ineligible to reappointment, are not vital or integral parts of the statute. If we eliminate them it will in no degree impair the efficiency of the statutory scheme for the reorganization of the police department. In *People ex rel. Fowler v. Bull (supra)* this court held that, although a provision of a statute extending the term of an elective officer was unconstitutional, another provision of the statute postponing the time for the election of the successor to the office was not so connected with the previous provision for the extension of term as to fall within it, though the effect of the decision was to leave the office vacant during the period for which the legislature had sought to extend the term. In *Demarest v. Mayor, etc., of N. Y.*, (74 N. Y. 161) the statute abolished the board of assistant aldermen and provided that the common council of the city of New York should thereafter consist of a board of aldermen to be elected in the prescribed manner. The constitutionality of the method provided for the election of the new board of aldermen was attacked. But this court held that it was unnecessary to decide the question, saying that whether the act was constitutional or not so far as it provided for the election of the new board, it was certainly valid so far as it

first degree; and as the indictment does not charge that the homicide was committed while the defendant was engaged in committing, or attempting to commit a felony, which is an essential element of the crime, the conviction was had upon a charge not contained or alleged in the indictment and is, therefore, illegal. (*Keefe v. People*, 40 N. Y. 356; *People v. Palmer*, 43 Hun, 404; *Dedieu v. People*, 22 N. Y. 178; *People v. Albrow*, 140 N. Y. 134; *People v. Kane*, 161 N. Y. 386; *U. S. v. Hess*, 124 U. S. 483; *People v. Barber*, 48 Hun, 200; *People v. Dumar*, 106 N. Y. 502; *People v. Flack*, 125 N. Y. 333; *Dolan v. People*, 64 N. Y. 497.) Upon the evidence in this case, if the defendant fired the fatal shot, he was not guilty of murder in any degree; but the killing, if by him, was in the proper and necessary defense of the defendant from a murderous assault upon him by the deceased. (Penal Code, §§ 183, 206; *People v. Shorter*, 4 Barb. 469; *Uhl v. People*, 5 Park. Cr. Rep. 410; *People v. Beckwith*, 103 N. Y. 360; 1 Whart. Crim. Law, § 304; *People v. Enoch*, 13 Wend. 159; *Keefe v. People*, 40 N. Y. 348; *Dolan v. People*, 64 N. Y. 485; *Buel v. People*, 78 N. Y. 472; *Cox v. People*, 80 N. Y. 500; *People v. Willett*, 102 N. Y. 251; *Mulligan v. People*, 5 Park. Cr. Rep. 105.) The court erred on the trial of this action in receiving improper evidence offered on the part of the People. (*People v. Molineux*, 168 N. Y. 264; *People v. Sharp*, 107 N. Y. 427; *Coleman v. People*, 55 N. Y. 81; *People v. Shea*, 147 N. Y. 78; *Commonwealth v. Jackson*, 132 Mass. 16; *Shafer v. Commonwealth*, 72 Penn. St. 60; *People v. Murphy*, 101 N. Y. 127; *Armstead v. State*, 22 Tex. App. 57; *People v. Kennedy*, 32 N. Y. 141; *People v. Kennedy*, 164 N. Y. 449.) Even if it be assumed that the case as presented by the People be true, and the evidence all legal and proper, still the same does not establish murder in any degree, but was justifiable homicide. (Penal Code, §§ 188, 205; *Shorter v. People*, 2 N. Y. 193; *State v. Cheatwood*, 2 Hill [S. C.], 450; *Evers v. People*, 63 N. Y. 625; *Real v. People*,

N. Y. Rep.]

Points of counsel.

55 Barb. 551; 42 N. Y. 270; *People v. Carlton*, 115 N. Y. 623; *People v. Druse*, 103 N. Y. 655; *People v. McCarthy*, 110 N. Y. 309; Kerr on Homicide, 12.) The trial judge erred in his charge to the jury in instructing them, as matter of law, that the accomplice Harris was corroborated. (*People v. Keffer*, 65 Cal. 232; Best on Ev. 492.)

E. A. Dox, District Attorney (George M. Palmer of counsel), for respondent. Under the indictment the People had a legal right to prove the commission of the crime of murder by the defendant, so long as the manner of the commission of the crime proven brings it under one of the statutory definitions contained in section 183 of the Penal Code. (*People v. Osmond*, 138 N. Y. 80; *People v. Giblin*, 115 N. Y. 196; *People v. Constantino*, 153 N. Y. 24; *Cox v. People*, 80 N. Y. 500; *Keefe v. People*, 40 N. Y. 348; *People v. Willett*, 102 N. Y. 254; *People v. Conroy*, 97 N. Y. 62; *Kennedy v. People*, 39 N. Y. 245; *People v. Fitzgerald*, 37 N. Y. 413; *People v. White*, 22 Wend. 176.) The homicide was committed while the defendant was engaged in the commission of, or in the attempt to commit, a felony, to wit, burglary; therefore, premeditation or design to effect death was not necessary. (*People v. Greenwald*, 115 N. Y. 523; *People v. Johnson*, 110 N. Y. 135; *People v. Meyer*, 162 N. Y. 357; *People v. Deacons*, 109 N. Y. 374; *Cox v. People*, 80 N. Y. 500; *Buel v. People*, 78 N. Y. 492; *People v. Lawton*, 56 Barb. 126; *Commonwealth v. Jacobs*, 91 Mass. 274; *Mullen v. State*, 45 Ala. 43; *U. S. v. Bott*, 11 Blatchf. [C. C.] 346.) It is not necessary that the corroborative evidence required by section 399 of the Code of Criminal Procedure, as a condition precedent to a conviction upon the testimony of an accomplice, should of itself be sufficient to show the commission of the crime, or to connect the defendant with it, but it is sufficient if it tends to connect the defendant with the commission of the crime. (*People v. Mayhew*, 150 N. Y. 346; *People v. Everhardt*, 104 N. Y. 591; *People v. Elliott*, 106 N. Y. 288; *People v. Houghkirk*, 96 N. Y. 149; *People v. Ryland*, 26

Hun, 568; *People v. Baker*, 27 App. Div. 597; *Lindsay v. People*, 63 N. Y. 143.) All of the corroborative evidence given on the part of the People was competent, relevant and proper, and the same was properly received. (*Hochsietter v. People*, 1 Keyes, 66; *People v. Ogle*, 104 N. Y. 511; *Ryan v. People*, 79 N. Y. 601; *Lindsay v. People*, 63 N. Y. 143; *Greenfield v. People*, 85 N. Y. 85; *People v. O'Neil*, 112 N. Y. 363; *Pierson v. People*, 79 N. Y. 424; Willis on Cir. Ev. 67; *People v. Shea*, 147 N. Y. 79; *People v. Hughson*, 154 N. Y. 162.) The evidence showing the breaking into the flag shanty, tool chest and tool house was properly admitted. (*People v. Murphy*, 135 N. Y. 450; *People v. Van Tassell*, 156 N. Y. 561; *Shafer v. Commonwealth*, 72 Penn. St. 63; *People v. Molineux*, 168 N. Y. 264; *People v. McLaughlin*, 150 N. Y. 386; *People v. Shulman*, 80 N. Y. 376; *People v. Sharp*, 107 N. Y. 427; *People v. Greenwald*, 108 N. Y. 296; *People v. McCann*, 143 N. Y. 455; *People v. Peckens*, 153 N. Y. 576.) This defendant and others formed a conspiracy to rob the post office at Cobleskill. While carrying out this conspiracy they killed Wilson, and for this crime all are guilty of homicide. (*People v. Van Tassell*, 156 N. Y. 561; *Kelly v. People*, 55 N. Y. 566; *Ruloff v. People*, 45 N. Y. 213; *People v. McKane*, 143 N. Y. 455; *People v. Peckens*, 153 N. Y. 576; *People v. Bauford*, 3 N. Y. Cr. Rep. 219.) The conspiracy between the defendant and those with him having been shown, the charge of the court upon the subject was not error, but was a correct statement of the law. (*People v. Sutherland*, 154 N. Y. 359.)

CULLEN, J. I have been constrained to reach a different conclusion from that held by Judge O'BRIEN. I agree with him that as the guilt of the defendant was submitted to the jury on both claims of the People, *first*, that the deceased was killed with a deliberate and premeditated design to effect his death, and, *second*, that he was killed by the defendant while the latter was engaged in the perpetration of a felony or an attempt to commit one, if as to either claim the evidence

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

was insufficient to justify the submission of the question to the jury the conviction must be reversed since it cannot be known on which ground the jury based its verdict. But I take issue with my associate on the proposition that there was any such inconsistency between the two claims as rendered it improper to submit both to the jury for determination. There was but a single crime charged in the indictment against the defendant, that of murder in the first degree, and the only issue to be determined by the jury was whether the defendant had been guilty of that crime. Under our statute (Sec. 183, Penal Code), so far as applicable to the case before us, proof either that the defendant killed the deceased with a deliberate and premeditated design to effect his death, or while the defendant was engaged in the commission of a felony or an attempt to commit a felony, though without any design to take life, established his guilt of the crime charged. "It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other." (*Murray v. N. Y. Life Ins. Co.*, 96 N. Y. 614.) So in this case it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one; it was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute. Ever since the enactment of the Penal Code, and even before that time since the law of 1876, by which homicide in the commission of a felony was made murder in the first degree, it has been the practice, in prosecutions for that crime, to submit the case to the jury in both aspects, premeditated and deliberate design to take life and killing in the commission of a felony. (*Buel v.*

People, 78 N. Y. 492; *People v. Willett*, 102 N. Y. 251; *People v. Johnson*, 110 N. Y. 134; *People v. Meyer*, 162 N. Y. 357.) This is no new doctrine in the administration of the criminal law; on the contrary, the principle involved is very old. For far more than a century past it has been the practice, approved by all courts and text writers, to charge, by the use of several counts, the same offense as committed in different manners or by different means. "There is no objection to stating the same offense in different ways in as many different counts of the indictment as you think necessary." (Archibald Crim. Practice, 93.) "Every cautious pleader will assert as many counts as will be necessary to provide for every possible contingency in the evidence and this the law permits." (Wharton Crim. Law, sec. 424.) In this state the practice is directly authorized by statute. (Code Crim. Pro. sec. 279.) Where the several counts charge the same offense, the prosecution will not be compelled to elect on which count it will proceed. "It is every day's practice to charge a felony in different ways in several counts for the purpose of meeting the evidence as it may come out upon the trial; each of the counts on the face of the indictment purports to be for a distinct and separate offense, and the jury very frequently find a general verdict on all the counts, although only one offense is proved; but no one ever supposed that that formed a ground for arresting the judgment. If the different counts are inserted in good faith for the purpose of meeting a single charge the court will not even compel the prosecutor to elect." (Opinion of Chancellor, *Kane v. People*, 8 Wend. 203.) In *People v. Rugg* (98 N. Y. 537) the defendant was indicted for murder in the first degree as charged in separate counts, some alleging premeditation and deliberation, others killing in the commission of a felony. The defendant on the trial moved that the prosecution be required to elect on which count of the indictment it would proceed. The motion was denied and the jury rendered a general verdict of guilty. The judgment was affirmed by this court. It was held by the Supreme Court of the United

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

States that a general verdict of guilty was good though one count of an indictment charged the offense to have been committed in a haven or bay, and another its commission upon the high seas. (*U. S. v. Pirates*, 5 Wheaton, 201.) The reasons for this practice are very clearly stated by Chief Justice SHAW in *Bemis's Webster Case* (471). "To a person unskilled and unpracticed in legal proceedings it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document; but it is often necessary, and the reason for it when explained will be obvious. The indictment is but the charge or accusation made by the Grand Jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death; * * * take the instance of a murder at sea; the man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide, by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow and a death by drowning, and perhaps a third, alleging a death by the joint results of both causes combined." In the case suggested by the learned judge it would certainly be unreasonable that the defendant should escape conviction because of difference of opinion among the jurors as to whether his victim was killed by the blow or by drowning, when all were convinced that the killing was effected by the felonious act of the defendant.

Nor is there the theoretical inconsistency between the two claims of the prosecution that has been assumed. It is not correct to say that if the offense was committed in one way it could not have been committed in the other. It is true that in the definition of the second manner in which the crime may be committed the statute reads: "Without a design to effect death." But this does not render absence of intent an essential ingredient of the offense, such as the killing or the commission of the felony, elements which the prosecution is bound to prove

beyond a reasonable doubt. "Without a design to effect death" is to be interpreted as meaning regardless of whether there was a design to effect death or not. This rule applies in a certain measure to the definitions of the various grades of homicide so far as those definitions prescribe the absence of an element which, if present, would constitute a higher degree of crime. By section 184 of the Penal Code murder in the second degree is defined to be the killing of a human being with the design to effect the death of the person killed or another, but "without deliberation and premeditation." By sections 189 and 193 the offense is manslaughter when committed "without a design to effect death." It is not necessary, however, that the prosecution should prove beyond a reasonable doubt in the first case that there was no deliberation, or in the second that there was no design to effect death. On the contrary, the rule is that where there is reasonable doubt in which of several degrees of a crime the defendant is guilty he must be convicted of the lowest degree. (Code Crim. Pro. sec. 390.) So an acquittal on the merits on an indictment for manslaughter or for murder in the second degree will bar a subsequent prosecution for murder in the first degree (Wharton on Homicide, sec. 898; Penal Code, sec. 36), which would not be the law if a conviction under either of such indictments could not be sustained by proof establishing the higher offense.

The direct evidence, including that of the witness Harris, who, as has been said by my associate, was sufficiently corroborated, proved circumstances which clearly established that the deceased was shot by the defendant and his associates, without relying on their subsequent statements to that effect. At about half-past one in the morning of the homicide the deceased and the witness Warner were standing at the corner of Main and Grand streets in the village of Cobleskill when, as that witness testifies, they saw a party of four or six men, whom he could not identify, pass up Grand street. He then left the deceased, went to his room and was preparing for bed when he heard the sound of shooting, several shots. He went

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

to the window and heard the barking of a dog. The noise appeared to come from the store of one Borst on Main street, a short distance from the place where he had been standing with the deceased. He immediately went to this store and found the body of the deceased there and several of the villagers present. Harris testified that the defendant and his associates turned off Main street and went towards the spot where the body of the deceased was found ; that a few moments afterwards they returned, and that the defendant had a wound in his hand from which a bullet was proved to have been subsequently extracted, and that Hinch, another of the party, had a wound in the shoulder, from which, also, a bullet was afterwards taken. A hammer which one of the party had obtained from the tool chest which they had broken open was found at Borst's store a few feet from the place of the homicide and the chisels and other tools which they had taken were found in the vicinity. Quite a fusilade had occurred and bullets had entered the windows of neighboring stores. No other persons except the defendant and his associates were seen in the vicinity of the spot where the homicide occurred. After the shooting a party of several persons was observed by the witnesses running away from that place. From these facts the inference seems irresistible that the encounter in which the life of the deceased was taken occurred between him and the men who but a few moments before had gone towards the scene of the occurrence, the men whose tools were found at the spot or in its vicinity and two of whom bore evidence on their persons in the shape of bullet wounds that they had taken part in a recent affray. Indeed, it is not strenuously contended that the proof did not warrant the jury in finding that the deceased was shot by the defendant or his associates. The claim is that the evidence was insufficient to establish the premeditation and deliberation necessary to constitute murder in the first degree. It seems to me that the real question in this branch of the case is rather whether the jury was justified in finding that the killing of the deceased was criminal than the degree of the crime. Though the statement of the defend-

ant or one of his associates to the witness Harris, "that they unexpectedly met a policeman and he fired at them and then they fired at him, and didn't know whether they hit him or not," was, as I have said, unnecessary to establish the connection of the defendant with the homicide, still, as it was put in evidence by the prosecution, the defendant was entitled to have it considered by the jury. The jury, however, was not required to believe it. The jurors could accept part and reject part; they could believe that the defendants shot at the policeman and disbelieve the statement that the policeman fired first. (*People v. Van Zile*, 143 N. Y. 368.) Stated in the baldest way, but reciting its essential features, the case is this: A party of several persons start along the street to commit burglary on the post office; at the scene of their intended crime they meet the deceased, a police officer; an encounter takes place, shots are fired on both sides and the police officer is killed. There is no eye-witness to the occurrence except the defendants themselves, who state that the police officer fired first. Now, while the defendant and his associates were criminals, or, at least, contemplating crime, he is entitled to a fair measure of justice and the law is not to be strained against him however bad may be his character. But it is impossible to disregard the errand on which he was bound in determining what actually occurred at the time of the homicide and the inferences the jury might properly draw from the occurrence. The defendant and every one of the party at the time they left Albany were armed. If a man going out at night on a lawful errand should arm himself, and thereafter an encounter take place in which he takes the life of another person, a jury might well infer in the absence of proof of malice or of the details of the occurrence that he had either taken life in self protection or in the heat of passion arising in some altercation. But these defendants did not arm themselves to protect their persons or their property. There is no reasonable explanation of their going armed, other than that they intended to shoot any person who should obstruct the accomplishment of their crime or at least any one who might

seek to apprehend them or prevent their escape. Starting out on such a mission and with such intent, they meet the police officer, shots are exchanged and the latter is killed. Which is the more reasonable inference from the occurrence, that the officer of the law seeing these persons who were strangers to him, while they were peacefully walking the street, having as yet given no evidence of any intent to commit an offense, sought without excuse or justification to shoot them, or that the defendant and his associates, fearing apprehension by the officer or being interrupted by him when they were in the attempt to commit a burglary, took his life in order that they might escape arrest? I think the jury was justified in adopting the latter view. If so, the deliberation and premeditation necessary to make out the crime of murder in the first degree could well be found to have commenced at Albany when the defendants started out on their predatory excursion; they had carried out the design then formed, to shoot any one who stood in their way.

I think the evidence was also sufficient to justify the jury in finding that the defendant and his associates were engaged in an attempt to commit a felony, to wit, a burglary, when they took the life of the deceased. "An act done with an intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." As observed by Mr. Wharton (Crim. Law, § 2696), mere intent is not the subject of penal action and an overt act is essential to impart to the intent criminal responsibility. The question of what overt act is sufficient to constitute an attempt to commit a crime has been the subject of much discussion by both text writers and courts, and of some conflict in the decisions. In the early English cases the view seems to have been adopted that to constitute an attempt the overt act must be the final one towards the completion of the offense and of such a character that, unless it had been interrupted, the offense itself would have been committed. The decisions in some of these cases seem to have been based on the phraseology of the particular statutes under which the indictments were

framed. This extreme doctrine has not been accepted in this country, certainly not in this state. Thus it has been held that where a prisoner put his hand into the pocket of another intending to take its contents it was an attempt to commit larceny, although there may have been nothing in the pocket to steal. (*People v. Moran*, 123 N. Y. 254; *Commonwealth v. McDonald*, 5 Cushing, 365.) The question in this case, however, is not as to the subject of the intended burglary, but whether the defendant and his comrades had proceeded far enough in the execution of their design for a jury to find that they were engaged in an attempt to commit the crime, there having been discovered on the building no marks of force or violence. Mr. Wharton asserts the doctrine that mere preliminary preparations in character indifferent (here they were not indifferent in character) cannot be deemed sufficient to constitute an attempt to commit the crime (Sec. 181). This view does not seem to be fully accepted by Mr. Bishop and appears in conflict with the decision in *People v. Bush* (4 Hill, 133), where the defendant having solicited one K. to burn a barn and having given him a match for that purpose, was held properly convicted of an attempt to commit arson, although K. never intended to burn the barn. But assuming that mere preparation is not in all cases an attempt to commit the crime, it is well settled in this country that it is not necessary to constitute an attempt that the act done should be the last proximate one for the completion of the offense. "However attempt is viewed in England, the act need not, according to the American idea, be the next preceding the one which would render such substantive crime complete." (Bishop, sec. 762.) "The question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. So far as the thief is concerned, the felonious design and action are then as complete as though the crime could have been, or, in fact, had been committed, and punishment of such offender is just as essential to the protection of the public, as one whose designs have been success-

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

ful." (*People v. Moran, supra.*) In *People v. Lawton* (56 Barb. 126) a conviction for an attempt to commit burglary was affirmed. The evidence showed that the defendant and an accomplice agreed to commit the burglary on a certain night; that in pursuance of such agreement they went to the store intended to be entered, carrying burglars' tools. When they arrived there they thought that the tools were not sufficient to effect an entrance and thereupon they started to go to a blacksmith shop to get a crow bar. Before entering into the blacksmith shop alarm was given and they were arrested. The case is cited with approval by Judge RUGER in *People v. Moran (supra)*. I do not see how it is possible to distinguish that case from the one before us. I do not assert that in the present case merely procuring the tools with which to commit the burglary constituted an attempt to commit it, and it may be that merely starting on the road towards the building was also insufficient to constitute an attempt. But when the defendants reached the building a different question is presented. The going to the building with the purpose of breaking into it, having procured in furtherance of that design the necessary implements, seems to me to be a sufficient overt act. It may be asked at what point of their proceedings did the acts of the defendants constitute an attempt. It is difficult, if not impossible, to lay down any general rule by which it can be determined whether acts are too remote to constitute an attempt to commit the offense. While the defendants were at a distance from the building they might have changed their minds and abandoned the design. But if the jury believed that the defendant and his associates were at the post office reconnoitering or inspecting it with the intent to break it open, and that they would have done so had their design not been frustrated by the presence or interference of the deceased, the police officer, then I think it could properly find that they were engaged in an attempt to commit burglary. If one with intent to shoot another should procure a pistol for that purpose, that alone might not amount to an attempt to shoot him. It may be

that if after procuring the pistol he took a conveyance to the residence of his intended victim, still that would not constitute an attempt. But if after this with his design unchanged he approaches the person he intends to shoot but is seized before he can draw the pistol, I think he is properly punished as having attempted to commit the crime. Whenever the acts of a person have gone to the extent of placing it in his power to commit the offense unless interrupted and nothing but such interruption prevents his present commission of the offense, at least then he is guilty of an attempt to commit the offense, whatever may be the rule as to his conduct before it reached that stage. This is clearly illustrated by Judge DANIELS in *People v. O'Connell* (60 Hun, 109), where the defendant was convicted of an attempt to commit assault in the first degree. There it was said: "Where the assault charged be made by means of a firearm or any other deadly weapon, it is necessary for the creation of the crime that the person intended to be assailed shall not be so far from the intended assailant as to be beyond all possibility of injury from him. *But that is not an essential circumstance in the case of an attempt.* For the assailant may load a firearm and then start towards the person to be assailed in order to attain reaching distance of him, or when the assault is intended to be made with an axe, which is the weapon mentioned in the indictment, the accused may obtain and raise it, intending to strike with it, when too far away from the person intended to be struck, and then approach towards that person and be intercepted before he can reach a position of danger to him, which would be an attempt to commit the crime charged. Each act would be an attempt to commit the crime charged. For a person who provides himself with an axe with which he intends to kill another, and afterwards approaches towards him to make that use of it, but is prevented from doing so by the flight of the other, or by being himself disarmed, or otherwise prevented from reaching his intended victim, commits acts tending to effect the commission of the crime within the language of this section of the Code."

N. Y. Rep.] Dissenting opinion, per O'BRIEN, J.

The objection to the sufficiency of the indictment is disposed of in the opinion of Judge O'BRIEN. There are no other questions raised on this appeal that require discussion. The case was submitted to the jury by the learned trial judge in a charge eminently fair, in which attention was called to every rule of law which safeguards the rights of a person on trial for his life or liberty. The jury has found the defendant guilty. I believe that verdict to be justified by the evidence, and that this court is not called upon to interfere with it.

The judgment should be affirmed.

O'BRIEN, J. (dissenting). The defendant has been convicted of murder in the first degree upon an indictment charging him with having, on the 27th day of November, 1900, shot and killed Matthew Wilson, a policeman, with the deliberate and premeditated design to effect his death.

About two o'clock on the morning of the day above named, Wilson was found dead upon the stone steps of a store in the village of Cobleskill, the body resting upon a platform or stoop in front of the store which was reached by two stone steps. He was evidently standing upon the platform when killed, as the body was found there with the feet resting lower down upon the steps.

It appeared upon the *post mortem* examination that there were four wounds upon the body inflicted by bullets fired from a pistol or revolver. One of the bullets passed through the left wrist, another was found in the left arm about two inches below the shoulder. This was a mere flesh wound and the bullet was readily extracted. The third wound was in the shoulder directly back of the scapular, and had penetrated deep in the muscles of the right shoulder from behind. None of these wounds was serious, or of a character to produce death. The bullet that produced death entered the right side at the seventh rib from behind, obliquely passing through the rib and the middle lobe of the right lung, thence through the pericardium of the heart to the right auricle and lodged in

the muscles under the left nipple, obliquely from backwards, forwards and upwards, as described by the medical testimony. The bullet when located was four or five inches higher up in the body than the point where it first entered. This, upon all the testimony, was the fatal wound, sufficient to produce instant death, and the indictment is framed and the prosecution based upon the theory that the defendant either feloniously fired the shot himself, or is legally responsible for the act if committed by some one else.

The People attempted to connect the defendant with the homicide by circumstantial evidence and by the testimony of an accomplice. There is very little information in the record with respect to the defendant's antecedent history, until we come to the 26th of November, 1900, the day prior to the homicide, when he and five other persons were at the house of a Mrs. Peters in Albany. One of the other persons was a man named Harris, who was the accomplice that testified at the trial under an arrangement with the district attorney made while he was in prison charged with this or some other offense. The defendant was identified as one of the six persons present at the house referred to by the woman who kept it and by her two daughters. The fact of his presence there is sufficiently established without the testimony of Harris, but what these persons were doing, or why they were together on that occasion, is not made very clear by the inmates of the house. It seems that three or more of the party took meals at the house, and the woman who testified, or at least one of them, said that she heard some conversation among them about a bank, the inference sought to be drawn from this testimony being that they were consulting upon the subject of robbing some bank. The jury, we think, could have found that some or all of the party were criminals, or at least that they were about to commit some crime, the precise nature of which is not clearly disclosed by the evidence. But their subsequent movements, culminating in the death of Wilson, so far as there is any direct testimony upon the subject, must

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

rest almost wholly upon the testimony of Harris, the accomplice.

He tells us that he was present at the meeting in Albany; that he and two other persons boarded or took meals at the house where they were, but did not disclose the plan of action agreed upon, if any; that at about seven o'clock in the evening of the 26th of November the whole party boarded a freight train that ran from Albany to Cobleskill, about forty-five miles distant. It appears that they rode on top of the cars as tramps, and were seen by the conductor, who did not interfere with them, so far as appears. They had bottles of whisky, which they imbibed quite freely on the journey, and the proof shows, or tends to show, that some or all of them, including the defendant, were drunk. The train stopped some time at the first station after leaving Albany, and the party all got off, but boarded the train again when it was about to start, and it arrived at Cobleskill about eleven o'clock. Harris relates the movements of the party from that time substantially as follows: After landing they walked on the railroad to a small shanty, broke the door, went in and remained there until about one o'clock in the morning smoking and drinking. Then they went to a coal house on the railroad in process of construction. There they broke open a tool chest, from which they took some chisels and tools. Then following the railroad, they went to a section shanty and, finding it locked, broke it open and took from it an iron crowbar. Harris says that he carried the crowbar, the defendant a hatchet, and some of the others the chisels, and they proceeded to the main street of the village. According to Harris, when they all got off the train at the station, they spoke of robbing the post office, which was on the main street, opposite the store where the shooting occurred. Before reaching this point on the street Harris says he and another of the party separated from the rest, and he threw away the iron bar upon a grass plat, leaving the others with only a hatchet and chisels. From this point Harris says that he has no personal knowledge of what occurred until the

party was again united after the shooting, but he testified that he heard the firing, and when he and his companion were joined by the rest *they*, including the defendant, told him that they had suddenly and unexpectedly met the policeman, who ordered them to stop, which order they disobeyed, whereupon he commenced to fire at them and they returned the fire. He did not, as he says, see the shooting, and, of course, was unable to identify the person who fired the fatal shot.

The testimony of Harris, the accomplice, so far as it relates to the journey of the party on the freight train, the arrival at Cobleskill, the breaking into the coal house and shanties, the procurement of the tools and crowbar, and the flight of the whole party across the country, their concealment in barns during the night and other incidents which he related, was corroborated by abundant proof; but his separation from his associates at the critical time and his absence from the immediate scene of the homicide, and the alleged statements or admissions made by his associates after the shooting as to the circumstances under which it took place, all rest upon his own statements. It was shown that the defendant was shot in the hand by a bullet which was subsequently extracted, and another of the party in the shoulder. The dead policeman's revolver was found near his body with five of the six chambers bearing evidence of having been recently discharged, and it is conceded that he could not have used it after he had received the fatal wound.

These are the material facts upon which the conviction must stand or fall. The case was submitted to the jury in two aspects. The jury was permitted to find that the defendant fired the fatal shot with a deliberate and premeditated design to effect the death of the person killed, or procured, aided, counseled or advised the act which resulted in his death. The case was also submitted to the jury upon the theory that they might find from the evidence that the defendant, without deliberation or premeditation, killed the deceased, or aided or abetted in the commission of the homi-

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

cide while attempting to commit a felony under the last clause of the statute. We cannot know upon which of these theories the jury based the verdict, and, therefore, the prosecution must show that the proof justified the court in submitting the case in both aspects, and that there was evidence upon which the jury could find that the homicide was committed while the defendant was engaged in an attempt to commit a felony and that the act was the result of deliberation and premeditation. The learned counsel for the defendant contends that these two theories of the case could not have been submitted to the jury upon a common-law indictment, but that the facts should have been alleged in order to bring the case within that clause of the statute which declares it to be murder in the first degree to commit the homicide when the accused is engaged in the commission, or in the attempt to commit a felony. The authorities do not support this contention. The law is now settled that under an indictment in the common-law form the prosecution may prove facts to bring the case within any of the provisions of the statute defining murder in the first degree. (*People v. Giblin*, 115 N. Y. 196; *People v. Osmond*, 138 id. 80; *People v. Constantino*, 153 id. 24; *Cox v. People*, 80 id. 500; *People v. Meyer*, 162 id. 357; *People v. Willett*, 102 id. 254; *People v. Conroy*, 97 id. 62; *Keefe v. People*, 40 id. 348; *Kennedy v. People*, 39 id. 245; *Fitzgerrold v. People*, 37 id. 413; *People v. White*, 22 Wend. 176.)

In one of the barns where defendant and his confederates were concealed during their flight from the scene of the homicide a bottle of nitroglycerine was found, which was evidently left there by the party, and the possession of this substance, with the tools and implements already described, proved, as is contended, that the party had planned and were about to commit a burglary when they came upon the deceased. This conclusion is, doubtless, supported by the evidence, and the jury could have found that the design of the party was to break into the post office, but, when the firing commenced, Harris, the accomplice, according to his statement, had sepa-

rated from the rest and had thrown away the crowbar, their most formidable instrument for use in the commission of this intended burglary. While the parties still had the chisel and the hatchet, and so far were prepared to make the attempt to break into the building, it is certain that no overt act was committed to that end, and the question is whether the purpose and intent of the parties had yet reached such a stage of action as to constitute an *attempt* to commit burglary within the meaning of the statute defining murder in the first degree. Of course, if they had entered the building, and while there, or in attempting to escape, had killed the watchman, although in self-defense, or in order to save their own lives, plainly the act would be murder in the first degree; and if there is no substantial distinction between that case and the one at bar, then it must follow that it was properly submitted to the jury. Whether the defendant and his associates were at the time of the homicide actively engaged in an attempt to commit a felony, within the meaning of the statute defining murder, is a question that seems to me not entirely free from doubt. None of the cases cited on this point by the learned counsel for the People are quite like this. Some of them, it is true, bear a close resemblance to it, while others differ widely. In none of them was the question involved with respect to what acts constitute an "attempt to commit a felony" within the meaning of the statute defining murder. (*People v. Lawton*, 56 Barb. 126; *McDermott v. People*, 5 Park. Cr. Rep. 104; *People v. Moran*, 123 N. Y. 254; *Mackesey v. People*, 6 Park. Cr. Rep. 114; *Com. v. Jacobs*, 91 Mass. 274; *Com. v. McDonald*, 59 id. 365.) The proof in this case would justify the finding that the defendant and his associates intended to commit some burglary, and that they provided themselves with tools for committing it, but whether there was any overt act to carry out the design is not so clear. But assuming that there was evidence to submit to the jury in support of the theory that the defendant killed the deceased while engaged in the attempt to commit a felony, we must also hold in order to uphold the conviction that there was evi-

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

dence to support the charge that there was a deliberate and premeditated design on the part of the defendant to effect the death of the person killed. Since both theories were submitted to the jury, they must find support in the proofs, and as there was no proof to show that the defendant fired the fatal shot, it was necessary to show that the whole party was acting in concert under an agreement or conspiracy, not only to commit a felony, but to take human life if thought necessary. All we know about the circumstances immediately preceding the homicide is based upon the statement or admissions of some one in the party, testified to by Harris, the accomplice, that they came suddenly upon the policeman, who commanded them to stop, and upon the refusal to do so he commenced to fire, and the defendant's party returned the fire which resulted in the death. The question arises here whether the proof was sufficient to warrant the jury in finding that the defendant killed the deceased from a deliberate and premeditated design to effect his death. If it was not then the case should not have been submitted to the jury under the first clause of the statute defining murder.

The proof in the case does not show that the party had any well-defined plan in mind when they left Albany. It does show, or tend to show, that some or all of them were more or less intoxicated, and while that does not excuse the act it bears upon the question of intent, deliberation and premeditation. It is evident enough that they were not professional, or at least skilled, burglars, since if they were they would not be likely to trust to the chance of procuring the necessary tools for their purpose at the place where their operations were to be carried on, or to throw away the crowbar before they had reached the building that they had designs upon. They were criminals, no doubt, of some grade or capacity, but the whole transaction from beginning to end tends to show that they were of an inferior order, without much skill, experience or ability. They were really a band of tramps, probably intoxicated, bent upon some mischief, but precisely what it was it is very difficult to gather from the proofs. Aside from

the testimony of the accomplice as to the talk among themselves there is as much reason to believe that they had designs upon the bank or any other building in the vicinity as upon the post office. Since there is no proof in the case to identify the person who fired the fatal shot, the defendant's legal responsibility for the homicide must rest upon the fact that he was one of a party that had entered into a joint agreement, conspiracy or confederacy to take human life if necessary in aid of some common criminal design. In order to hold the defendant responsible for the acts or statements of the rest of the party or any of them the proof must come up to this standard. Passing for the present the question whether the case was properly submitted to the jury on the theory that the homicide was committed while the defendant and others were engaged in an attempt to commit a felony under such circumstances as to render any one of the party responsible for the acts or statements of the others, I do not think that the evidence was sufficient to warrant a finding that the killing of the deceased was the result of a deliberate and premeditated design on the part of the defendant to effect his death. That intent and design cannot, upon the evidence, be imputed either to the defendant personally or to any confederacy of which he was a member.

The evidence certainly warranted the jury in finding that the defendant was present and acting with his associates, and that they were engaged in some criminal scheme that failed of execution, but resulted in the homicide. This policeman, engaged in the performance of his duty, met his death by the act of one or more of a combination of criminals, and courts ought not to be astute to relieve any of them from the punishment which the law prescribes for such a wicked act. At the same time the defendant is entitled to a fair trial and to the benefit of the rules of law applicable to criminal procedure. The difficulty with the case is that we cannot affirm the judgment without holding that the proof sustains two propositions of fact that apparently are somewhat in conflict with each other. The one is that the defendant killed the deceased

with a deliberate and premeditated design to effect his death, or counseled, aided or abetted the killing with a like design. The other is that, without any design to effect death, he killed the deceased or counseled, aided or abetted the killing while engaged in the commission of a felony. The criminal act resulting in death is different in nature and character under the two provisions of the statute, and while the People had the right to give proof under the indictment of all the facts, yet when the proof was all in it could not establish both propositions. If the proof tended to show that the deceased was killed without any design to effect death, but while the parties were engaged in an attempt to commit a felony, it necessarily excluded the theory that he was killed from a deliberate and premeditated design. It would seem to follow that the case should have been submitted to the jury on one theory or the other, and not upon both. But while conceding that both theories should have been established by proof, it is contended that both were properly submitted to the jury, since half the jury might have accepted one theory and the other half the other theory. I am unable to appreciate the force of the reasoning in support of this proposition. If it be correct it must follow that the chances of a conviction are very much improved by the introduction of various theories in support of a single charge. If, for instance, it were possible for the prosecutor to try the case upon a dozen theories and a single juror could be induced to assent to each theory, the whole body could unite in a verdict of guilty although no one theory could command the assent of more than a single juror. This method of procedure, with all respect, strikes me as very much like what has long been known in legislative parlance as log-rolling, the art of which consists in framing a bill with numerous separate or independent provisions, none of which would pass upon its own merits, but each of which is made attractive enough to command a certain number of votes which being united are sufficient to pass the bill. The Constitution contains some provisions intended to suppress

this vice in legislation, but it was never supposed that it could be introduced into the jury room and applied in a capital case. The argument in favor of it ought not to be accepted unless the reasons and authority in favor of it are clear and conclusive, and I am bound to say that in my opinion they are not.

The case was submitted to the jury upon the theory that there was evidence to support two conflicting propositions of fact, namely, that the homicide was committed from a deliberate and premeditated design to effect the death of the person killed and that it was committed without any such design or any intent to effect death, but when the accused was engaged in an attempt to commit a felony. When a capital case is submitted to a jury upon two different theories concerning the facts, the evidence must be of such a character as to sustain both. If either theory is not supported by evidence a verdict based upon the whole case cannot be permitted to stand. Of course a homicide may be committed by one engaged in an attempt to commit a felony, with the intent to kill and with deliberation and premeditation, and then all the elements constituting murder in the first degree are established, but in this case all we know and all the jury could know concerning the circumstances of the shooting is what Harris, the accomplice, says that some one of the party admitted to him after it took place, and that was that the party, when walking in the street, came upon the policeman suddenly and unexpectedly and he commenced to fire at them and then they fired at him and the fusilade resulted in the death of the deceased. The responsibility of the whole party of six men for the death of the person killed is, upon the facts, the same as to each one of them. If this defendant is guilty of murder in the first degree so are all the others. No intent, deliberation or premeditation can be imputed to the defendant that is not to be imputed to the whole body. The proof must show that at some appreciable space of time prior to the firing of the fatal shot the defendant and his associates, confederating together, and acting in concert, formed a deliberate and pre-

meditated design to effect the death of the person killed, or some human being. (*People v. Wilson*, 145 N. Y. 628.) Considering all the circumstances of this case from the interview between the parties in Albany, the journey on the freight train, the arrival at Cobleskill, the condition that the party were in, the alleged separation of two of them from the rest when the crowbar was left behind, the firing when the deceased was standing on a platform in front of a store upon which it is not claimed they had any design, or intended to enter, it cannot, I think, be said that there was such proof of all these elements of murder in the first degree as to sustain the verdict. The identity of the person who fired the first shot is an important element in the determination of the question. The only direct proof on that point is to be found in the testimony of the accomplice as to the statement of the party that the policeman fired first, when they refused to stop and then they returned the fire. It is suggested that the jury could have rejected these statements as untrue, and assuming that they could, the question arises what could they have substituted in its place. Nothing except the theory which seems to me to be without any support in the proof at all, and that is that the defendant or some one in the party of which he was one fired the first shot. That proposition must be made out, if at all, by pure conjecture and speculation. Certainly no one can say that it is established beyond a reasonable doubt. What the accomplice testified to on this point is quite as reasonable and probable as anything else that he said, and to reject it without anything but inference or presumption to substitute in its place is rather an extreme principle to apply in a capital case. If the conviction must rest upon the fact that the party of which the defendant was one were engaged in an attempt to commit a felony, namely, the burglary of the post office, that proposition is not free from doubt. In order to establish it within the meaning of the statute there must be proof of something more than the intent or the possession of some of the tools, such as the chisel and hatchet, but there must be some overt act, such as an actual physical inter-

ference with the person where robbery and larceny from the person is intended, or some physical interference with the house or building when burglary is the subject. (*People v. Moran*, 123 N. Y. 256; *Mulligan v. People*, 5 Park. Cr. Rep. 105; *Cox v. People*, 80 N. Y. 511, 517; *People v. Stites*, 75 Cal. 570; *People v. Phelps*, 61 Hun, 115.)

In this case there is proof of the intention, and proof that the party had in their possession some of the instrumentalities for the commission of burglary, even after the crowbar had been dropped out, but they had not yet arrived at the building and had made no physical attack upon it, or committed any overt act towards entering it. Aside from the fact that they were near to the building, they were practically in the same position that they were when they started from the coal house, or the shanty near the railroad track. On the whole it seems to me that the case is too close and doubtful to warrant us in affirming the conviction upon the record now before us. If we are to believe the accomplice, he and another of the party threw away the crowbar, the most formidable instrument that the party had to break into a building, and separated from the rest. There is no proof of any act on the part of the defendant or the others constituting an attempt to break into the post office. Whatever may have been said among themselves by any of the party as to their purpose or intentions, there is no proof that the deceased heard or knew anything about it. The elements that constitute murder in the first degree have to be supplied by inferences and presumptions that are scarcely permissible in a capital case. Aside from the testimony of the accomplice as to the admission by some one that the deceased commenced to fire first and that the party or some of them fired in return, there is no proof of the facts and circumstances under which the crime was committed. Whether it was preceded by the intent to kill and by deliberation and premeditation, those essential elements in the crime of murder in the first degree, is a matter of mere inference which in this case is little better than speculation. These elements of the crime were not established

beyond a reasonable doubt in my opinion, and hence there should be a new trial.

GRAY, MARTIN, VANN and WERNER, JJ., concur with CULLEN, J.; O'BRIEN, J., reads dissenting opinion; PARKER, Ch. J., absent.

Judgment of conviction affirmed.

ST. REGIS PAPER COMPANY, Appellant, v. THE SANTA CLARA LUMBER COMPANY, Respondent, Impleaded with Another.

1. CONTRACT—CONSTRUCTION—EQUITABLE RELIEF. A contract for the sale and delivery of a designated quantity of pulp wood a year, for a certain period of years, to be taken from specified premises, owned by the contracting party, who agrees not to sell the land so as to prevent the complete fulfillment of the contract, and further agrees that the purchaser shall have an equitable interest in the wood for advances to be made in the progress of the work, is not an agreement which involves a mere sale of chattels, in default of which the remedy at law is adequate, but is an agreement under which the purchaser acquired certain rights in connection with the land, for the protection of which relief may be sought in equity.

2. REMEDY AT LAW—WHEN INADEQUATE. The remedy at law for the refusal of the vendor to perform such contract and furnish a specified quantity of pulp wood per year, from the designated premises, for a long term of years, which may, at the election of the purchaser, be extended for another term of the same length, is inadequate where the future price of the wood, the cost of transportation and the rate of wages throughout such period are unknown quantities, and where such future contingencies as the destruction of the timber by fire, or the taking of the land by the state in the exercise of eminent domain, contemplated by the contract, prevent an accurate computation of damages in the future.

3. TRIAL—DISMISSAL OF COMPLAINT ON PLEADINGS—ERRONEOUS WHEN ISSUES RAISED. A complaint in an action for the specific performance of a contract is improperly dismissed upon the pleadings where the plaintiff insists that it has fully performed the contract, while the defendant admits it has attempted to rescind it on the ground of plaintiff's non-performance, and has proceeded in a general way as if the contract no longer existed, thus raising distinct issues for trial.

St. Regis Paper Co. v. Santa Clara Lumber Co., 66 App. Div. 617, reversed.

(Argued December 12, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 21, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The plaintiff seeks in this action the construction and specific performance of a contract, the material portions of which read as follows:

"This agreement, made this 29th day of August, in the year one thousand eight hundred and ninety-nine, between The Santa Clara Lumber Company, a domestic corporation duly incorporated and organized under the laws of this State, of the first part, and the St. Regis Paper Company, also a domestic corporation duly incorporated and organized under the laws of said State, of the second part, is as follows:

"The said party of the first part agrees to sell and deliver to the said party of the second part, at any point, the expense of transportation to which shall not exceed the cost of transportation from Tupper Lake Junction to Watertown, N. Y., in each and every year for ten years, commencing with the first day of June, in the year one thousand nine hundred, or as soon thereafter as the season will permit, from eleven to thirteen thousand cords of barked pulp wood, 2½ inches long, such delivery to commence on or about the first day of June, one thousand nine hundred, and to continue for ten years thereafter, at the rate of about twelve hundred cords per month for ten months of each calendar year; such wood shall be good, merchantable, green spruce and balsam, to be kept and shipped separately, if said party of the second part requests the same to be so shipped, and to be not less than four inches in diameter at the small end in the rough, before rossing, at the price of \$9.00 per cord, and said wood shall be green, growing wood when cut and shall be properly prepared, barked and sawed and delivered free from bark or dirt. The wood so cut shall consist of all the green spruce upon the lands cut over so as not to deliver to said second party more small wood than is necessary, except first party may reserve

N. Y. Rep.]

Statement of case.

all spruce 14 inches in diameter or over at top, 12 feet long or longer.

“ Party of first part shall commence to cut wood on or about the 15th day of August of each year for the following season’s supply. Party of the second part shall make such advances of money to party of the first part as it may request during the progress of the work, but party of the second part need not advance more than approximately the cost of work done. Payment for the said wood shall be made by the party of the second part to the party of the first part on the 15th day of each month for the wood delivered during the next preceding calendar month, after first deducting from the aggregate of the purchase price of the said wood one-tenth of the advances made upon that season’s operations until such advances have been repaid. * * *

“ It is further agreed that in case the mill of the party of the first part shall be destroyed or disabled by the elements or fire, a reasonable time shall be allowed to said party of the second part for the reconstruction of the same, and this agreement shall be deemed extended accordingly ; but in no case shall there be delivered in any one year more than 13,000 cords of barked wood.

“ It is further provided that in no case shall said party of the first part be required to deliver in the aggregate (unless it shall chose so to do) more than the amount of pulp wood which may be obtained from the lands now owned by it, being about thirty-two thousand (32,000) acres.

“ And it is further provided that in case the pulp wood upon its lands shall be either wholly or in part destroyed by fire or the elements, that then and in that case it shall not be required (unless it shall so choose) to deliver any more wood in the aggregate than it is still able to obtain from its said lands, provided wood has not hereafter been cut from said lands and sold to other parties. In such case first party agrees to purchase and deliver to second party as much wood as has been delivered to others, but not in the aggregate to exceed 120,000 cords.

"It is further provided that in case the lands of said party of the first part or any part thereof shall be condemned and taken by the State of New York that this contract shall be deemed modified and limited in so far as the ability to perform the same on the part of the said party of the first part shall have been affected thereby, but

"It is further provided that in case such condemnation takes place to such an extent as to impair the ability of said party of the first part to perform this contract, the said party of the second part shall have the right, so far as the party of the first part is hereby able to confer the same, to claim from the State of New York the damages sustained by it in consequence of the non-delivery of said pulp wood, the delivery of which has been prevented by such condemnation.

"It is further provided that said party of the first part will not, during the term of this contract, sell any of its said lands or the pulp wood thereon so as to in any way jeopardize or prevent its complete fulfillment and performance of this contract.

"It is further agreed that if the said party of the second part shall choose so to do and shall give said party of the first part notice in writing of such election at least one year before the expiration of the term of this contract, to continue this contract for ten years longer by paying \$12.00 per cord for such rossed pulp wood so delivered as herein provided, that then and in that case the said party of the first part shall sell and deliver to said party of the second part 12,000 cords of rossed pulp wood in each year for ten years from and after the term of this contract, subject to all the terms, limitations and specifications hereinbefore contained.

"Is is further agreed that said party of the second part shall be deemed to have an equitable interest in said pulp wood for advances made by them as hereinbefore provided, and the equity of said second party in this contract is assignable and may be used as collateral security for the payment of any loan or obligation made by said second party.

"It is further agreed that if the lands of the first party

N. Y. Rep.]

Statement of case.

herein referred to or the lands owned by second party are hereafter damaged by fire so that it becomes necessary to cut therefrom to avoid waste, said party so damaged may thereupon give reasonable notice to other party of such damage and deliveries upon this contract may be increased or decreased, as the case may be, to a reasonable extent to permit the party so damaged to conduct its operations in the woods so as to avoid unnecessary waste of wood so damaged. * * *

"It is further agreed that in case the pulp and paper plant of said party of the second part shall be destroyed or disabled by the elements or fire that a reasonable time shall be allowed for the reconstruction or reparation thereof, during which time, if said party of the second part shall so elect, no delivery of pulp wood shall be made and this contract shall be deemed extended accordingly. * * *

"All matters of difference that shall arise between the parties respecting this contract or the fulfillment thereof shall be submitted to two arbitrators, one of which shall be chosen by each party, and in case they fail to agree, a third arbitrator or umpire shall be chosen by the two arbitrators first appointed, and the decision of a majority shall be binding upon the parties.

"In witness whereof, the parties hereto have affixed their hands and seals on the day first above written, binding their successors and assigns."

Elon R. Brown and *Henry Purcell* for appellant. Meaning and effect must be given to all language employed in a contract, provided it will not do violence to the plain intent of the parties in making the agreement. (*Buffalo E. S. R. Co. v. B. S. R. R. Co.*, 111 N. Y. 132; *Hamilton v. Taylor*, 18 N. Y. 358; *Wood v. Sheehan*, 68 N. Y. 365; *Bank of Montreal v. Recknagel*, 109 N. Y. 482.) Equity should take cognizance of the plaintiff's interest in the defendant's lands under these covenants as the contract savors of the realty. (*Mayor, etc., v. Law*, 125 N. Y. 380; *S. C. F. M. Co. v. S. W. D. Co.*, 33 Fed. Rep. 146; *Charles Barker v. Bailey*, 17 R.

I. 495; *Willoughby v. Lawrence*, 116 Ill.11; *Jones v. Britton*, 9 S. E. Rep. 562; 2 Story Eq. Juris. § 929; *W. P. I. Co. v. Reymert*, 45 N. Y. 703; *Livingston v. Livingston*, 6 Johns. Ch. 497; *Fox v. Fitzsimons*, 29 Hun, 576; *Erhardt v. Boaro*, 113 U. S. 537; *Wood v. Braxton*, 54 Fed. Rep. 1005.) The covenant in the contract, "said party of the first part will not during the term of this contract sell any of its said lands or the pulp wood thereon so as to in any way jeopardize or prevent its complete fulfillment and performance of this contract," should be enforced by injunction. (Waterman on Spec. Perf. §§ 1, 6; Bispham's Eq. § 461; 3 Pom. Eq. Juris. §§ 1342, 1344; Pom. on Spec. Perf. §§ 25, 310; Beach on Inj. §§ 429, 430, 443, 444; *S. F. Co. v. S. C. Co.*, 157 N. Y. 60; *E. G. L. Co. v. B. C. Co.*, 63 Md. 299; *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Donnell v. Bennett*, L. R. [22 Ch. Div.] 835; *S. S. M. Co. v. U. B. & E. Co.*, 1 Holmes [U. S. Cir.], 253; *Peabody v. Northrup*, 98 Mass. 452; *W. U. T. Co. v. Rogers*, 42 N. J. Eq. 311; *W. U. T. Co. v. U. P. R. R. Co.*, 3 Fed. Rep. 423; *C. & A. R. Co. v. N. Y.*, *L. E. & W. R. R. Co.*, 24 Fed. Rep. 516; *Goddard v. Wilde*, 17 Fed. Rep. 846.) Relief by specific performance should be decreed to save the plaintiff from irreparable mischief otherwise resulting from defendant's breach of contract. There is no adequate remedy at law. (2 Story's Eq. Juris. [8th ed.] §§ 719, 721a; *Buxton v. Lister*, 3 Atk. 384, 385; *Adderly v. Dixon*, 1 Sim. & Stu. 607; *E. G. L. Co. v. B. C. T. & Mfg. Co.*, 63 Md. 299; *Donnell v. Bennett*, L. R. [22 Ch. Div.] 835; *Masterton v. Mayor, etc.*, 7 Hill, 61; *Devlin v. Mayor, etc.*, 63 N. Y. 8; *Wakeman v. W. & W. Mfg. Co.*, 101 N. Y. 205.) The plaintiff is entitled to have every intendment taken in its favor in construing the complaint upon this motion to dismiss. (*Hoffman v. Wright*, 137 N. Y. 621; *Sanders v. Soutter*, 126 N. Y. 193.)

Henry W. Jessup and *Albert Stickney* for respondent. The plaintiff suing in equity does not allege facts sufficient to constitute an equitable cause of action. (*Wisner v. C. F. J. Co.*, 25 App. Div. 362; *Edson v. Girvan*, 29 Hun, 422;

Swart v. Boughton, 35 Hun, 281; *Willis v. Fairchild*, 19 J. & S. 405; *Fisher v. C. O. L. Ins. Co.*, 20 J. & S. 179; *Sheridan v. Jackson*, 72 N. Y. 170; *Marble v. Ripley*, 10 Wall. 339; *Rayner v. Stone*, 2 Eden, 127; *Blackett v. Bates*, L. R. [1 Ch. App.] 117; *Fothergill v. Rowland*, L. R. [17 Eq.] 132.) Specific performance of the contract in suit must be refused on the ground of the lack of definiteness and certainty in the contract. (*Burton v. Lister*, 3 Atk. 386; *Lord Walpole v. Lord Orford*, 3 Ves. 420; *Lighthouse v. T. Nat. Bank*, 162 N. Y. 336; *Winne v. Winne*, 166 N. Y. 263.) Specific performance of the contract should be denied on the ground of the impossibility of enforcing the contract in suit, by reason of the fact that its performance would require the constant intervention of a court of equity for a long period of years, with the frequent decision of many incidental questions of fact and law. (*R. M. Co. v. Ripley*, 10 Wall. 310; *Beck v. Allison*, 56 N. Y. 366; *Wheatley v. W. C. Co.*, L. R. [9 Eq.] 538; *Blackett v. Bates*, L. R. [1 Ch. App.] 117; *Powell-Duffryn Co. v. Taff-Vale Co.*, L. R. [9 Ch.] 331.) Specific performance of the contract should be denied on the ground of the lack of mutuality in the remedy. (*R. M. Co. v. Ripley*, 10 Wall. 310; *Benedict v. Lynch*, 1 Johns. Ch. 370; *P. P. C. Co. v. T. & P. R. Co.*, 11 Fed. Rep. 625; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Norris v. Fox*, 45 Fed. Rep. 406; *Phillips v. Berger*, 8 Barb. 527; *Duff v. Hopkins*, 33 Fed. Rep. 599; *Woodward v. Harris*, 2 Barb. 439; *Stocker v. Wedderburn*, 3 K. & J. 303; *Duvall v. Meyers*, 2 Md. Ch. 401.) There is an absence of any equitable lien. (*Lighthouse v. T. Nat. Bank*, 162 N. Y. 336; *Grinnell v. Suydam*, 3 Sandf. 132.) An action for damages will afford full relief to the plaintiff under the situation alleged in the complaint, and is the only method for doing justice between the parties. (*Bagley v. Smith*, 10 N. Y. 489; *Wakeman v. W. & W. Mfg. Co.*, 101 N. Y. 205; *W. C. & Mfg. Co. v. Holbrook*, 118 N. Y. 586; *Swain v. Schieffelin*, 134 N. Y. 471; *Dickinson v. Hart*, 142 N. Y. 183; *U. S. T. Co. v. O'Brien*, 143 N. Y. 384.)

This contract does not give to the plaintiff any interest or estate in the lands owned by the defendant. (19 Am. & Eng. Ency. of Law, 259.) The remedy by injunction being ancillary to the main object of the bill, it should not be granted if equity cannot specifically enforce the contract. (*Stokes v. Stokes*, 103 N. Y. 708; *Fargo v. N. Y. & N. E. R. R. Co.*, 3 Misc. Rep. 205; *S. F. Co. v. S. C. Co.*, 157 N. Y. 60; *Hentz v. L. I. R. R. Co.*, 13 Barb. 646; *R., W. & O. R. R. Co. v. City of Rochester*, 46 Hun, 149.) The plaintiff does not make out a case to support an injunction. (*Fothergill v. Rowland*, L. R. [17 Eq.] 132; *Watt v. Rogers*, 2 Abb. Pr. 261; *Martin v. Johnston*, 6 Misc. Rep. 310; *N. Y. C. Co. v. Halleck*, 15 N. Y. Supp. 517; *Nash v. Hall*, 11 Misc. Rep. 468; *Gurnee v. Odell*, 13 Abb. Pr. 264; *Stull v. Westfall*, 25 Hun, 1; *Curter v. Ferguson*, 58 Hun, 569.) The allegations as to rescission in the answer must be considered by this court in connection with the incomplete allegations of performance in the complaint. (*Blanchard v. Trim*, 38 N. Y. 225; *Wright v. Smith*, 13 App. Div. 536; *Koerner v. Henn*, 8 App. Div. 602; *Stockdale v. Schuyler*, 130 N. Y. 674; *Cox v. Stokes*, 156 N. Y. 491.)

BARTLETT, J. The complaint was dismissed by the trial judge on the pleadings and the opening of plaintiff's counsel and judgment entered to that effect, which was affirmed by the Appellate Division without opinion on the authority of same case in 55 Appellate Division, 225 (66 App. Div. 617). We are now called upon to review this determination.

This case has been twice before the Appellate Division on questions of remedy; on an appeal by the defendant from an order continuing an injunction *pendente lite* (31 Misc. Rep. 695), which resulted in reversal with an opinion (55 App. Div. 225); again on the defendant's appeal from an order of the Special Term, made after the affirmance of judgment dismissing the complaint, denying a motion to cancel the notice of *lis pendens*; this order was affirmed with an opinion. (62 App. Div. 538.)

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

The plaintiff seeks in this action the enforcement of a contract providing, in substance, for the sale and delivery by the defendant to the plaintiff of twelve thousand cords of pulp wood a year for the period of ten years, with an option in the plaintiff to extend the term of the contract for another ten years.

It is the contention of the plaintiff that it has set forth in the complaint an equitable cause of action which entitles it to the remedies and protection afforded by a court of equity to litigants who are properly before it.

On the other hand, it is argued by the defendant that this contract involves merely a sale of chattels, to wit, pulp wood, which may be cut by the defendant from any premises it sees fit, and that assuming it is in default of its contract, the plaintiff's remedy at law is adequate.

The counsel for the plaintiff argues that while it is a contract for the sale of chattels, it is of chattels that are to be severed from the realty, according to its terms, for the purpose of delivery, and that by those terms its faithful performance by the defendant is secured by covenants which fastened on the land indicated therein and its products so far as is necessary to insure that the chattels will be severed and delivered.

As the dismissal of the complaint was upon the pleadings, the question as to the sufficiency of the pleading is presented as upon demurrer.

An examination of a few provisions of the contract makes it very clear that the contention of the defendant's counsel that it involves a mere sale of chattels is erroneous.

The complaint alleges, in this connection, that at the time the contract was made the defendant was the owner of thirty-two thousand acres of land situated in the county of Franklin, and gives a lengthy description of the property, and avers that this tract was all the forest land which the defendant owned, and that the contract was made and entered into with reference to such land.

We thus have the premises identified from which this pulp wood was to be obtained.

There are other provisions of the contract which show con-

clusively that the parties were contracting with reference to these premises.

This provision is found in the contract: "The wood so cut shall consist of all the green spruce upon the lands cut over, so as not to deliver to said second party more small wood than necessary."

It also provides that in case the mill of the defendant is destroyed by fire a reasonable time is to be allowed for the reconstruction of the same, and in this connection occurs the provision: "It is further provided that in no case shall said party of the first part be required to deliver in the aggregate (unless it shall choose so to do) more than the amount of pulp wood which may be obtained from the lands owned by it, being about thirty-two thousand acres."

There is a provision calculated to protect the defendant in case all or part of the pulp wood on these premises is destroyed by fire, or if the whole or a portion of the premises are condemned by the state of New York, to the effect that it shall not be compelled to deliver in such an emergency any more pulp wood "than it is still able to obtain from its said lands."

Then follow these significant provisions:

"It is further provided that said party of the first part will not, during the term of this contract, sell any of its land or the pulp wood thereon so as to in any way jeopardize or prevent its complete fulfillment and performance of this contract."

"It is further agreed that the said party of the second part shall be deemed to have an equitable interest in said pulp wood for advances made by them as hereinbefore provided and the equity of said second party in this contract is assignable and may be used as collateral security for the payment of any loan or obligation made by said second party."

The contract obligates the plaintiff to make advances from time to time to the defendant, as follows: "The party of the second part shall make such advances of money to the party of the first part as it may request during the progress of the work, but the party of the second part need not advance more than approximately the cost of work done."

The complaint alleges that the defendant entered upon the lands in question and commenced the cutting of the pulp wood under the contract about the first of October, 1899, and notified the plaintiff that it was so doing; that it called upon the plaintiff to make advances under the terms of the contract, which it did in the aggregate sum of twenty-five thousand dollars; that notwithstanding the plaintiff so performed its contract, the defendant assumed to rescind the contract on the ground, as alleged in the answer, that the plaintiff was in default of its covenant to make necessary advances for work done.

The complaint also avers that following this attempted rescission, the defendant entered into a contract in writing with its co-defendant, the Brooklyn Cooperage Company, which is set forth in full, wherein it appears that the defendant has covenanted to convey to the Brooklyn Cooperage Company about one-half of the thirty-two thousand acres of land.

The complaint further avers that the total amount of wood pulp upon the thirty-two thousand acres subject to the contract in question does not exceed two hundred and forty thousand cords. In other words, this allegation implies that all the pulp wood on the premises is not more than sufficient to meet the demands of the contract if it covers a period of twenty years.

There is also an averment that the defendant has refused to deliver to plaintiff the pulp wood covered by these advances and upon which it has an express lien under the terms of the contract.

As a further ground of equitable relief, it is alleged that at the time the plaintiff entered into the contract it was but recently organized, and was then engaged and is now engaged in the construction of a large paper and pulp plant in Wilna, Jefferson county, which is being completed as rapidly as possible and involves an expenditure of about one million of dollars; and that the failure of the defendant to perform its contract works irreparable damage to the plaintiff.

It is further averred that since the execution of this contract the price of pulp wood has greatly advanced owing to the increasing scarcity of the timber from which it is cut.

From the situation of the parties as disclosed by the contract and the allegations of the complaint, which for the purpose of this appeal stand admitted, it is apparent that the plaintiff's remedy at law is inadequate. Any attempt to prove damages that might result to the plaintiff by the non-performance on the part of the defendant would encounter insuperable difficulties, as the contract extends over a term of ten years, and at the election of plaintiff may cover a period of ten years more.

The market price of pulp wood, the cost of transportation and the rate of wages, all essential in determining damages, would be unknown quantities in a problem involving so long a period. Furthermore, the contingencies contemplated by the contract, of the destruction in whole or in part of the timber by fire, or the taking of all or some portion of the land by the state in the exercise of the right of eminent domain, prevent an accurate computation of damages in the future.

The view we entertain of this case renders it unnecessary to decide at this time whether a court of equity should enforce the specific performance of this contract, or should confine the relief granted to the enforcement of its negative covenants.

The time over which a contract extends is not necessarily controlling as to specific performance. This court has decreed specific performance of a contract between railroad corporations extending over a period of twenty-one years. (*P. P. & C. I. R. R. Co. v. C. I. & B. R. R. Co.*, 144 N. Y. 152.)

In a late case we have refused to decree the specific performance of a contract, involving a period of only two years, on the ground that it required various and continuous acts and the exercise of such special skill, taste, judgment and supervision as to render judicial control extremely difficult, but confined the relief to the enforcement of the negative covenant which afforded some protection to the plaintiff. (*Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60.)

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

The relief of plaintiffs by the enforcement of negative covenants is very common and has been extended to cases involving a contract for the sale of or interest in chattels. (*Donnell v. Bennett*, L. R. [22 Chan. Div.] 835; *Peabody v. Norfolk*, 98 Mass. 452; *Goddard v. Wilde*, 17 Fed. Repr. 845; *Equitable Gas Light Co. v. Baltimore Coal, Tar & Mfg. Co.*, 65 Md. 73.)

The plaintiff insists that it has fully performed the contract and asks for its specific performance and the usual relief in equity, while the defendant admits that it has attempted to rescind the contract on the ground of plaintiff's non-performance, has covenanted to convey to another corporation fully one-half of the premises in question, and in a general way proceeded in a manner as if the contract no longer existed.

We have here distinct issues that should have been tried by the Special Term, and the dismissal of the complaint under these circumstances was error.

The Appellate Division in affirming the judgment dismissing the complaint did so upon its opinion written on reversing the order granting an injunction restraining the defendant from conveying any portion of the land in question in violation of the terms of the contract during the pendency of the action. In that opinion it held, in substance, that in view of the difficulties involved in compelling obedience to its decree the specific performance of the contract would not be directed. It also held that as the plaintiff's ultimate success was doubtful, and the injury to the defendant which would follow the injunction would be greater than any possible injury which would result to the plaintiff from its denial, afforded an additional reason for denying the injunction *pendente lite*. (55 App. Div. 225.)

The questions of the propriety of granting the injunction *pendente lite* and of setting it aside on appeal are not before us, and we refrain from expressing any opinion in the premises.

After the issues have been tried and the precise facts in this case established, the trial judge will be in a position to determine whether the court will decree the specific perform-

ance of the contract and issue its injunction in aid thereof, or confine the relief to the enforcement of the negative covenants.

The trial of the issues will present to the judge presiding a different state of facts than were before the Special Term on the motion to dismiss the complaint on the pleadings, controlled, as it was, by the decision of the Appellate Division setting aside the injunction *pendente lite*.

Counsel suggested on the argument that the plaintiff's interest in the defendant's thirty-two thousand acres of wood lands is analogous to the legal estate of *profit a prendre*. The right of *profit a prendre* has been defined to be the right to take something which is the produce of the land, such as coal or mineral from the earth or seaweed from the shore. (Jones on Easements, §§ 49, 56, 57.)

The Court of Errors said in *Post v. Pearsall* (22 Wend. 425, 433) that this right "when not granted in favor of some dominant tenement cannot properly be said to be an easement, but an interest or estate in the land itself."

There is some conflict of authority as to the precise limits of the definition of *profit a prendre*, and while it may be true that the plaintiff's claim under this contract bears some analogy to the right suggested, we content ourselves with holding that the complaint states an equitable cause of action, and, read in connection with the contract, shows that the plaintiff has acquired certain rights in connection with the land in question that can only be definitely ascertained and defined after the trial of the issues presented by the pleadings.

The judgment appealed from should be reversed and a new trial ordered, with costs to the plaintiff in all the courts to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT and CULLEN, JJ., concur; VANN, J., absent.

Judgment reversed, etc.

POLLY LAVINIA CRAWFORD, Appellant, v. EUGENE NASSOY,
Respondent.

DECEDENT'S ESTATE—WHEN TITLE TO A PORTION OF PROPERTY VESTS ABSOLUTELY IN WIDOW—CODE CIV. PRO. § 2713—NO OBLIGATION TO REDUCE IT TO POSSESSION THROUGH ADMINISTRATION IN SURROGATE'S COURT. The property of an intestate leaving no minor children, to the extent and of the character specified and enumerated in section 2713 of the Code of Civil Procedure, vests absolutely in the widow, and the right of possession follows the legal title; if the administrator fails to surrender her property she is not obliged to bring him to account in a Surrogate's Court, and, when he has refused upon demand to make an inventory as required by the statute and has appropriated to his own use the property and money belonging to her, she may maintain an action of conversion against him.

Crawford v. Nassoy, 55 App. Div. 433, reversed.

(Argued December 16, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 24, 1900, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Ernest F. Kruse for appellant. When a husband dies the widow is not compelled to wait three months until she can compel an inventory before she is entitled to relieve her immediate necessities from her husband's estate without subjecting herself to a suit at the hands of the administrator; but as to the specific articles enumerated in subdivisions 1, 2, 3 or 4 of section 2713 of the Code of Civil Procedure, she is entitled to maintain an action of conversion without any inventory being made. (*Fox v. Burns*, 12 Barb. 677; *Hyde v. Stone*, 7 Wend. 354; *Vedder v. Saxton*, 46 Barb. 188.) Pleadings are not to be construed strictly against the pleader, and if thereunder plaintiff is entitled to give the evidence

necessary to sustain her cause of action demurrer will not lie. (*Coatsworth v. L. V. R. R. Co.*, 156 N. Y. 451; *Sage v. Culver*, 147 N. Y. 241; *R. O. Co. v. Culver*, 68 N. Y. Supp. 303; *Lorillard v. Clyde*, 86 N. Y. 384.) The complaint was sufficient. (*Matter of Williams*, 52 N. Y. Supp. 700; *Matter of Hembury*, 75 N. Y. Supp. 933.)

George W. Wheeler for respondent. The proper place for any legal onslaught by those interested in this estate is the Surrogate's Court of Erie county. (Code Civ. Pro. § 2472.) While the Supreme Court has concurrent jurisdiction with the Surrogate's Court, yet it will not exercise its power and supersede the jurisdiction of the Surrogate's Court in matters which are peculiarly within its cognizance unless some special circumstances are assigned and facts stated showing that full, complete and substantial justice cannot otherwise be done. (*Chipman v. Montgomery*, 63 N. Y. 221; *Barrowe v. Corbin*, 31 App. Div. 172; *Mathews v. Studley*, 17 App. Div. 303; *Hard v. Ashley*, 117 N. Y. 606; *Matter of Arkenburgh*, 11 App. Div. 193.) Irrespective of the rights of the appellant to the property in question, the respondent, as administrator, came into possession of the same lawfully. He, by virtue of his office, was entitled to the possession thereof. Any interest the appellant has is subject to his right of possession to inventory the same. (*Voelckner v. Hudson*, 1 Sandf. 215; *Fox v. Burns*, 12 Barb. 679; *Vedder v. Saxton*, 46 Barb. 188.)

O'BRIEN, J. The courts below have sustained a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The basis of the action is to be found in the provisions of § 2713 of the Code. That section enacts, among other things, that if a man having a family die leaving a widow but no minor children, then certain property specified and enumerated in the section shall belong to the widow. On the death of the husband the legal title to the property thus reserved for her and specified in the statute

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

vests in the widow. The statute declares that it shall not be deemed assets or appraised, though it must be included in the inventory. The object of including it in the inventory was to identify it as part of the property left by the deceased. An administrator has no title, possession or right of possession of property which the statute declares is not assets subject to appraisal, but belongs absolutely to the widow. This brief view of the substance of the statute will enable us to determine whether the complaint in this case states a cause of action.

All facts stated in the complaint are deemed to be admitted by the demurrer, and it is only necessary to see what these facts are. It is stated that on the 16th day of February, 1898, the plaintiff's husband died, leaving no minor children and no property except the sum of \$110 cash in bank, a couple of watches, a little wearing apparel and household property not exceeding in value \$40, and that the whole estate left by him did not exceed in value \$150. It is alleged that the plaintiff became the sole owner thereof upon the death of her husband and became entitled to the possession. This last allegation may be deemed to be a statement of the law as found in the statute, but the statement that the deceased left property in all not exceeding one hundred and fifty dollars in value is an admitted fact. It is then alleged that the defendant, on the 24th of February, 1898, procured letters of administration to be issued to himself by the surrogate without the knowledge or consent of the plaintiff, the widow, and without any notice to her or waiver on her part; that the defendant then proceeded to draw the money from the bank and converted it to his own use and has refused to pay it over to the plaintiff or to deliver to her the other articles of property, although the plaintiff demanded payment to her of the money and delivery to her of the property before the commencement of the action. It is further alleged that the defendant has neglected and refused to make or file an inventory, although requested so to do and more than three months have elapsed since the alleged letters were issued to him, and

that whatever property or money came to his hands left by the plaintiff's husband has been disposed of and expended by the defendant.

On the face of the complaint it would seem to be plain that the defendant has converted to his own use money and property that belonged to the plaintiff. The legal title to the property certainly vested in some one upon the death of the intestate. No one can well contend that it vested in any one else but the widow, and the right of possession followed the legal title. The courts below, as we understand the opinions, hold nothing contrary to this view. The decision sustaining the demurrer seems to be based upon the proposition that the widow cannot reduce the property which the law gives to her to possession otherwise than through the regular course of administration. That is to say, that if the administrator does not choose to surrender her own property to her she must bring him to an account in the Surrogate's Court. It is difficult to see what the surrogate has to do with property which is not assets and which the statute declares belongs to the widow. There is no reason why she has not the same remedies to protect or recover her own property that any other owner has. Among the articles which the statute enumerates and gives to her absolutely is wearing apparel. It cannot be that when the law gave it to her it was ever intended that she could not reduce it to possession and enjoyment, except through administration in the Surrogate's Court, and what is true of that is equally true of all the other articles and property described in the statute. The defendant has not been sued for any act or default in his official capacity, but as a wrongdoer in appropriating to his own use the plaintiff's property. The facts appearing on the face of the complaint, admitted by the demurrer, sustain such an action. We cannot perceive that any of the numerous cases cited in the learned opinion below decide any principle contrary to what is here stated. They all hold, as we understand them, that the title to such property vests absolutely in the widow, and if the duty of the administrator to inventory the property confers

some right to possession for that purpose, such right cannot survive the taking of the inventory, and certainly can have no application to a case where, as in this case, the administrator has never made an inventory and refuses to make one, but has sold all the property without one.

The order should be reversed, and the demurrer overruled, with costs in all courts to the plaintiff, with leave to the defendant to answer within twenty days upon payment of costs.

PARKER, Ch. J., GRAY, BARTLETT and HAIGHT, JJ., concur ; CULLEN and WERNER, JJ., absent.

Order reversed, etc.

INDIA WHARF BREWING Co., Appellant, v. BROOKLYN WHARF
AND WAREHOUSE COMPANY, Respondent.

1. CONSTRUCTION OF CONVEYANCE BY WAREHOUSE COMPANY OF LOTS BOUNDED BY A WHARF FRONTING ON BASIN, RESERVING OWNERSHIP AND CONTROL THEREOF. *It seems*, that a conveyance by a wharf and warehouse corporation authorized to construct docks, piers, basins, etc., of certain lots bounded by a wharf, in front of which was a navigable basin, artificially constructed and owned by the company, which furnished access from the wharf to the harbor, and which at the time of the conveyance was practically free from piers and all other obstructions as represented on a map filed in the county clerk's office and referred to therein for the purpose of identifying the particular lots sold, their location, situation and boundaries, and which conveyance expressly reserved to the company the ownership and control of both the wharf and the basin with the right to charge surrounding owners of warehouses for the use of the same, does not require the grantor to keep the basin entirely free from piers as it appeared on the map and as it was when the grant was made for all future time, and confers no right upon the grantee to prevent the subsequent construction or extension of a pier in front of its property without its consent, although its means of access to the basin are to some extent impaired thereby.

2. GENERAL RULE AS TO LOTS EXHIBITED ON MAP AND BOUNDED BY STREET NOT APPLICABLE. *It seems*, that the representation of the lots on the map as bounded by a street or space does not render applicable in its full scope and meaning the general rule that where lots are sold which are exhibited on a map referred to in the deed and bounded by a street, the

purchaser obtains an easement in the street, because the grantor expressly reserved the ownership, use and control of the designated street with the right to receive the rents and profits.

3. RIGHTS OF GRANTEE. *It seems*, that the grantee has an easement of access to the water from which he cannot be entirely cut off, but it is subject to reasonable regulation and control by the grantor, and if in its interest and that of the public it undertakes to construct or extend a pier, the effect of which will be to reduce the grantee's means of access to the water, the latter must show that such act is unreasonable and a substantial infringement upon his rights in order to entitle him to an injunction.

4. APPEAL — DISMISSAL OF, WHEN QUESTION OF FACT MIGHT BE INVOLVED IN DECISION UPON THE MERITS. Where, it appears from the record that the question whether the acts of the grantor are reasonable or unreasonable might, under some circumstances, involve an inquiry of fact, depending, among other things, upon the nature of the changes in its business and the necessity for improvement, an appeal from a judgment of the Appellate Division reversing, upon the law and the facts, a judgment of the Special Term, in an action brought to restrain it from constructing or extending a pier in front of the grantee's lots, will be dismissed.

I. W. Brewing Co. v. Bklyn. Wharf & W. Co., 59 App. Div. 38, appeal dismissed.

(Argued December 16, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 13, 1901, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward M. Shepard and *Henry Yonge* for appellant. The appeal involves only questions of law. (*Otten v. M. Ry. Co.*, 150 N. Y. 395; *Hirshfield v. Fitzgerald*, 157 N. Y. 166; *Griggs v. Day*, 158 N. Y. 1.) The cause is one of equitable cognizance. (*Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Milhau v. Sharp*, 27 N. Y. 611; *Wheelock v. Noonan*, 108 N. Y. 179; *Garvey v. L. I. R. R. Co.*, 159 N. Y. 323.) The Appellate Division erred in treating a failure of plaintiff's claim to a fee in India wharf and the basin itself as conclusive

of the case. The judgment at Special Term was none the less right and necessary to protect plaintiff's easement. (*Dorchester v. Dorchester*, 121 N. Y. 156; *Knoch v. Bermuth*, 145 N. Y. 643; *Penny v. R. Ry. Co.*, 7 App. Div. 595.) The grant to Griswold should be held to include a right to the preservation of the basin and its surrounding wharves substantially as shown on the map of 1841, and as described in the grant. (*Lampman v. Milks*, 21 N. Y. 505; *Holloway v. Southmayd*, 139 N. Y. 390; *Johnson v. S. I. Assn.*, 122 N. Y. 330; *Cunningham v. Fitzgerald*, 138 N. Y. 165; *Lord v. Atkins*, 138 N. Y. 184; Washb. on Easements [4th ed.], 294; *Child v. Chappel*, 9 N. Y. 246; *Weynaud v. Lutz*, 29 S. W. Rep. 1097.) The reservation to the defendant of the control, interest and income of the piers and basin implied no more than a right of reasonable regulation of the traffic and a right to lawful charges. The reservation must not be construed in derogation of the grant. (*Wells v. Garbutt*, 132 N. Y. 435; *Duryea v. Mayor, etc., of N. Y.*, 62 N. Y. 592; *Blackman v. Striker*, 142 N. Y. 55; *Holloway v. Southmayd*, 139 N. Y. 390; 3 Washb. on Real. Prop. [6th ed.] 681.) The construction of piers projecting into the basin after 1847 did not create for the dock company a right to build any other pier or obstruction. (Jones on Easements, § 247; *Matter of Twenty-ninth Street*, 1 Hill, 189.) If the "control" reserved to the defendant could in any event include the right to build a dock in the basin or otherwise to obstruct the basin and diminish the accessibility of plaintiff's pier lots, the reasonable character of such exercise of control would present a question of law for this court. (19 Am. & Eng. Ency. of Law [2d ed.], 645; *Bedlow v. N. Y. F. D. D. Co.*, 112 N. Y. 268; *Chittenden v. Wurster*, 152 N. Y. 358; *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455; *Vedder v. Fellows*, 20 N. Y. 126; *Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31.)

John M. Bowers and *Latham G. Reed* for respondent.
The mere delineation on a map of lots proposed to be sold of

a basin, does not of itself make any dedication thereof to the public or to proposed purchasers or grant an easement therein, and this is especially the case of such delineation of a public basin or wharf. (*Ice Co. v. Shultz*, 116 N. Y. 389; *Pearsall v. Post*, 20 Wend. 111; *Post v. Pearsall*, 22 Wend. 425; Washb. on Easements [4th ed.], 555; Jones on Easements, § 473; *C. N. Co. v. U. T. Co.*, 46 L. R. A. 826; *Palen v. Ocean City*, 64 N. J. L. 669; *Greene v. N. Y. C. R. R. Co.*, 12 Abb. [N. C.] 124; *Tift v. City of Buffalo*, 65 Barb. 460; *Irwin v. Dixon*, 9 How. [U. S.] 10; *Parker v. W. C. Co.*, 5 L. R. A. 61; *Pitcher v. N. Y. & E. R. R. Co.*, 5 Sandf. 587.) The Appellate Division having reversed upon the facts as well as the law, this court will not entertain this appeal. (*F. Nat. Bank v. Dana*, 69 N. Y. 116; *Blair v. Lynch*, 105 N. Y. 636; *Cunningham v. Fitzgerald*, 138 N. Y. 171; *Otten v. M. Ry. Co.*, 150 N. Y. 401.) If the plaintiff is correct in its assertion that the Appellate Division did not pass upon the question of a grant of an easement, it is difficult to see how in such event it would be entitled to the consideration of that question in this court. (Code Civ. Pro. § 190; *Coatsworth v. L. V. R. R. Co.*, 156 N. Y. 451; *Schenck v. Barnes*, 156 N. Y. 316; *Hearst v. Shea*, 156 N. Y. 177; *Steinway v. von Bernuth*, 167 N. Y. 498; *Mutter of Robinson*, 160 N. Y. 448.)

O'BRIEN, J. The plaintiff recovered a judgment at the trial for the relief demanded, but it was reversed upon appeal on the law and the facts, and, hence, if the judgment involved any questions of fact the case is not reviewable in this court. It is reviewable, however, if only questions of law are involved and there is no dispute about facts or inferences of fact. The controversy involves the mutual rights, duties and obligations of the parties to this action in and to the Atlantic Basin, an artificial harbor which for commercial purposes furnishes access to the sea for the warehouses and commercial establishments that surround it. The rights of the parties depend upon certain conveyances and transactions made and

entered into more than sixty years ago between the respective grantors of the parties. Whatever legal rights were granted or reserved in these conveyances inure to the benefit of the parties to this action and may be asserted by either of them, since they only take whatever their respective grantors had. The defendant acquired its title and rights in the basin through a deed from the Atlantic Dock Company on January 28th, 1895. That company was incorporated by chapter 215 of the Laws of 1840 for the purpose of erecting and maintaining docks, bulkheads, piers, basins, dry docks, foundries and warehouses for commercial purposes in Brooklyn within the line established by law for the erection of docks, and was authorized to receive reasonable dockage and wharfage from all persons using the same. It procured the title to a considerable tract of land and land under water and constructed the present basin and the wharves and docks surrounding the same. The basin is described as two-fifths of a mile in length, six hundred and sixty feet wide on the southeasterly side opposite the plaintiff's property and one thousand feet wide on the westerly side. The income of the corporation was to be derived from the sale of lots upon which to erect warehouses around the basin and from charges for wharfage and dockage. It was organized for purely commercial purposes, and its financial success depended upon a judicious management of the property and the exercise of the powers conferred by its charter. The defendant has succeeded to all the rights, powers and privileges of this company. In 1841 this company made and caused to be filed a map showing such basin and wharves, with the streets owned by it surrounding the basin, with the lands fronting on the wharves or streets divided into lots and numbered. In July, 1842, the company conveyed to Griswold certain lots situated at the northerly end of the basin. There were twenty-five lots distinguished in the deed by numbers and described on a map of the property. The language of the deed is: "All the lots lying on the easterly side of the said India Wharf, and for the precise locality of each of the said lots reference is hereby made to

the said map, which map is filed in the office of the clerk of the county of Kings, subject, however, to the right of way in common with others over the streets or space between the said lots and the outside line or face of the dock in the basin side of said lots, which street or place is fifty feet wide as laid down on their said map." The consideration of the deed was forty thousand dollars, and it contained full covenants. It was provided that in case a store or warehouse should be erected on the lots or any of them, the building should be constructed in a certain manner and with certain materials. It will be seen that the deed did not bound the property conveyed on the basin but at a point fifty feet westerly, with the street or wharf between the lots and the edge of the basin. The deed expressly reserved to the company, the grantor, "the right to all dockage or wharfage as well as the entire control, interest and income of all their piers, docks, bulkheads and basin." The grantor bound itself "to keep the said piers, docks and bulkheads in repair at their own proper cost and expense." On the 24th of November, 1842, the company, in consideration of twenty-five thousand two hundred dollars, conveyed to Griswold twenty-five other lots to the east and in the rear of the lots just conveyed. Subsequently, and in the year 1847, by consent of all the parties in interest, the width of India Wharf was reduced from fifty to forty feet and the ten feet added to the Griswold property. By a subsequent instrument executed in 1848 between the company and the grantees of certain lots all the lots conveyed are described as fronting the basin as described on the map. At that time the basin was free from all obstructions, there being no pier or dock except the pier, wharf or dock surrounding the basin. Whatever rights or easements were embraced in these conveyances to the grantee they are now vested in the plaintiff as the owner of the same property under various mesne conveyances from Griswold. By a provision in the deed of 1842 the owner of any store or warehouse erected on any of the lots conveyed was to "have the right of laying down railways from each of the said lots to the outside line of said dock in

such manner as will admit carts and carriages to pass over them with convenience and so as not to obstruct the passageway."

The plaintiff claims that under these deeds and the map referred to it is vested with an easement of access to and from the wharf in front of its property, consisting of a warehouse and brewery, to the extent of over four hundred feet along the wharf in front of the property, and it was for what was deemed to be an invasion of that right that the present action was commenced to restrain the defendant from making certain changes in the piers that have been constructed in the basin in front of plaintiff's property. It appears that at various dates since the year 1860 the company has constructed at least four piers in the basin in order to add to its capacity and to facilitate the business of the company. Neither the plaintiff nor any other lot owner on the basin made any objection to these changes in the interior of the basin. The evidence in the case would seem to indicate that it was all done with at least the tacit assent of the lot owners. The changes which the company made and is about to make are described upon the map and brief submitted as follows: It has built certain piers on both the east and west sides of the basin. Two piers have been built on the west side, one known as pier thirty-six, being about nine hundred and eight feet long, the other known as pier thirty-seven, being about nine hundred and six feet long. On the other or east side in front of plaintiff's property it constructed pier thirty-four, being about nine hundred and eleven feet long, and pier thirty-five in front of plaintiff's property, connecting with pier thirty-four, which latter pier thirty-five is, to the point of connection, some six hundred and twenty-eight feet in length, and the object of the present action is to prevent the defendant from destroying the connection between piers thirty-four and thirty-five and continuing the latter to its junction with India Wharf. In other words, the defendant by extending the pier thirty-four about one hundred and fifty feet to the wharf in front of plaintiff's property, it is said, did obstruct, at least to some extent, the access to and from the wharf in

front of plaintiff's property and interfere with the use of the basin at that point. It is obvious that the space in the basin in front of plaintiff's warehouse for mooring boats and landing goods alongside will be reduced by the construction or extension of the pier to the edge of the wharf. Where the plaintiff had some four hundred and twenty feet of the basin in front of the warehouse as a means of access by boats and water craft to the wharf, it will now have when the pier is extended some eighty-seven feet less. The learned counsel for the plaintiff contends that the grant to Griswold secured to the plaintiff an easement of access in the basin, and that the approach to the wharf through the basin must be kept free from all obstructions and just as it was when the grant was made. The learned counsel for the defendant denies this proposition and insists that the extension of the pier to the wharf is but an exercise of that control and management of the basin which the company reserved in the deed to Griswold. The right to extend the pier to the wharf in front of the plaintiff's warehouse presents the whole controversy in the case.

The learned counsel for the plaintiff contends that this is a pure question of law arising upon the construction of the grant from the dock company to the plaintiff's remote grantor. The several provisions of that grant, which have already been referred to, must be construed with reference to the nature of the transaction itself and the objects and purposes that the parties had in view. It was a conveyance of real property, not upon the basin itself, but upon a wharf fifty feet wide, separating the property from the basin. Both the wharf and the basin were, according to the stipulations in the deed, to remain private property, the rents and profits of which the grantor expressly retained. The grantor also expressly reserved the right to manage and control the basin and the wharf, and the question is whether this reservation, made with reference to a peculiar kind of property, confers upon the defendant the right to do everything that it has done in and about the basin and the wharves. It cannot be reason-

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

ably contended that at the time of the grant in question the parties intended that the only method of landing or shipping goods was to be by boats or vessels moored alongside the wharf. If the company that constructed the basin and the docks for mercantile purposes and for profit was limited in that way by the grants which they made, it would seriously diminish the amount of business that could be transacted in the basin, while if the grants and reservations permitted the grantor to build piers and docks in the basin itself where vessels could land, load and unload, the capacity of the basin, for the purpose for which it was intended, could be very largely increased.

The rights of the grantee in the deed are not analogous to those acquired in a grant of land bounded upon public waters, or upon a public place such as a park or square. The wharf and the basin remain the private property of the grantor, affected only by such public interests as arise from the nature of the business to be conducted. The party owning the basin and the dock was entitled to exercise all its corporate powers to promote its own interest and profit so far as consistent with the rights of other parties to whom they had conveyed lots for the purpose of erecting warehouses.

We think that the act of the defendant, or its predecessor in interest, in constructing the piers and docks in the basin, was a reasonable exercise of the power of control reserved in the deeds. It would be an extreme view of the property rights conferred by the plaintiff's deed to say that because there were no piers in the basin in front of its property when the grant was made none could be thereafter constructed without its consent. The intention of the parties as expressed in the grant no doubt was to give to the plaintiff such use of the dock and the basin as was reasonably necessary in the transaction of its business; but the company in making the grant did not bind itself to preserve the situation as it then existed for all time to come. If the nature of the business called for the construction of docks or piers in the basin, we think it had the right to construct them, even though it

reduced the facilities of the plaintiff and lot owners similarly situated for mooring boats or water craft alongside. If all the lot owners to whom grants were made by the company could thus limit the use of the basin, the business might prove unprofitable to the company. On the other hand, the construction of the piers at both ends of the basin has undoubtedly added largely to the facilities for the transaction of business. The space for mooring boats or vessels in front of the plaintiff's warehouse may be reduced, but so long as it has reasonable means of access to and from the basin, no property right acquired by the grant has been violated. The reference in the deed to a map on file was for the purpose of identifying the particular lots sold, their location and situation; but since the other provisions in the deed reserved to the grantor the whole income and profits to be derived from the use of the basin and the wharves, the easement of access secured to the plaintiff was subject to reasonable regulation and control by the company. When a person sells lots exhibited upon a map referred to in the deed and bounded by a street, the purchaser obtains an easement in the street. Whether the proposed street is ever actually dedicated to the public or is accepted, it becomes by the grant a means of access to the lot by the purchaser and all claiming under him, unless changed by contract, waived or abandoned. It was so held in the cases cited by the learned counsel for the plaintiff. (*Lord v. Atkins*, 138 N. Y. 184; *Cunningham v. Fitzgerald*, Id. 165; *Haight v. Littlefield*, 147 N. Y. 338.) But this general principle is not applicable in its full scope and meaning to the case at bar. If it appeared in the cases cited that the grantor of the land expressly reserved to himself the ownership, use and control of the designated street with the right to receive the rents and profits, they would bear a much closer resemblance to the case at bar, and it cannot be doubted that the nature of the grantee's easement in the street would then be quite different. In the present case the grantor sold certain lots bounded by a wharf in front of which there was a navigable basin artificially constructed for commercial purposes that furnished access from

the wharf to the harbor. The grantor expressly reserved the ownership and control of both the wharf and basin with the right to charge surrounding owners of warehouses for the use of the same. The grantor was bound to keep them both in repair, that is to say, suitable for the wants of business and commerce for which alone they were valuable. The business was not then fully developed, but both parties to the grant must have contemplated that the business would not only grow in volume, but change in the method of transacting it. Certainly the grantor would have the right to dredge out the basin and make it deeper if the convenience and necessities of the situation required the change. When the grant under which the plaintiff acquired title from the company was made the whole end of the basin fronting the lots conveyed was practically free from piers and all other obstructions as the property was represented on the map. The practical question is, did the grantee by his deed acquire the absolute right to insist upon that condition of the basin for all future time. If so, some right and power to control the basin must have passed with the lots conveyed and full control was not reserved by the grantor notwithstanding the clear language of the reservation. The fact that the basin was represented at that time without piers or obstructions was not in the nature of a covenant on the part of the company that it should remain so for all time, although reference was made to the map for the purpose of identifying the lots. The reservations in the deed, when construed in the light of the business that both parties had in view, are inconsistent with the right of the grantee to forbid reasonable improvements and changes in the basin. If the business expanded, as it evidently has, so that it could not be transacted at the wharves surrounding the basin, then the company had the right to furnish additional facilities by the construction of piers such as that which the plaintiff seeks to enjoin in this case. The company owed duties to the public, as well as to the lot owners, and these duties were not to be measured by the facilities which existed when the enterprise was in its incipi-

ent stages. The interests of the company and the duties that it owed to the public authorized and required it to enlarge the facilities for the transaction of business in every reasonable way, and it was not restricted in that respect by the grant or the map to which it referred. The ownership of the basin and the wharves, with the right to the income and profits to be derived from both, and the obligation to keep them in repair with the reservation of full control, implies all that, and, hence, if the construction of the pier in question was convenient or necessary for the transaction of the business to which the basin and wharves were devoted, no property right of the plaintiff was invaded. So it cannot, we think, be said as matter of law that the defendant violated any of the plaintiff's rights when it attempted to extend the pier and wharf in question. No one, we think, can fairly assert that the defendant had no right to construct piers in the basin at some point or points. How many piers it had the right to construct and at what points was a question it had the right to determine for itself, subject only to the rights of the parties to whom it had conveyed property for warehouses surrounding the basin.

If we were compelled to decide the case as one of law upon the present record, we should say that the act of the defendant was reasonable and within its rights as reserved by the deed; but it is evident from the record that the case was not tried or decided below upon the theory now suggested. On the principle that the grantee in the deed took nothing but an easement of access to and from the wharf through the basin, the nature and extent of that easement does not seem to have been considered thus far in the case. The controversy in the courts below seems to have turned upon the claims of the plaintiff to be the owner in fee of some part of the basin. As the learned court below reversed the judgment in favor of the plaintiff at the trial upon law and facts, it is quite possible that, under certain circumstances, the right to construct the pier in question might involve a question of fact. The defendant has no right to so control and manage the basin as

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

to cut the plaintiff off entirely from access to the water. On the other hand, the plaintiff has no right to insist upon unreasonable restrictions. Whether the act of the defendant complained of was reasonable or unreasonable might, therefore, under some circumstances, involve an inquiry of fact depending, among other things, upon the nature of the changes in the business and the necessity for improvement. We do not assert that it is a question of fact upon the present record, but since the aspect of the case now presented does not seem to have been tried or considered below, we are not disposed to foreclose the plaintiff by an affirmance of the judgment. We do not think, however, that the contention of the learned counsel for the plaintiff, that the basin must at all times be kept entirely free from piers and as it was when the grant was made, can be sustained.

The appeal should, therefore, be dismissed, with costs.

BARTLETT, J. (dissenting). I am unable to agree with the majority of the court that this record discloses a disputed question of fact, or conflicting inferences to be drawn from admitted facts, upon which the Appellate Division rested its judgment of reversal.

The order of reversal states that the judgment of the Special Term is reversed on questions of fact and of law, but we have frequently held this statement does not create a question of fact. (*Otten v. Manhattan Railway Co.*, 150 N. Y. 395, 401.)

Whether there is a question of fact is always a question of law which the court decides for itself by an examination of the record.

The sole question in this case is one of law and depends upon the construction to be given the deeds of 1842 and 1848, and the maps of 1841 and 1847. Upon this construction alone rests the plaintiff's right of access from its premises to the Atlantic Basin.

The Special Term decided, in reference to the acts of defendant as to which complaint is made, "that such entry

by the defendant and the partial construction of said pier in the said water slip or water way is unlawful and illegal and was done without the consent and against the will of the plaintiff and in violation of the rights of the plaintiff in the said slip or water way."

It also decided "that the further construction of said pier, or the maintenance of the portion of the same already constructed, will seriously and irreparably damage the said property of the plaintiff and diminish the value of the same."

These findings, that the action and proposed action of the defendant were an invasion of the rights of the plaintiff, were necessarily based on a construction of the deeds and maps to which reference has been made and only involved a question of law.

The record contradicts the statement contained in the order of reversal, that it was based on questions of fact and of law.

The determination of the Appellate Division that plaintiff is not the owner of the India Wharf did not dispose of this case. The question still remained what rights were vested in the plaintiff by the deeds and maps in question.

There was very clearly established by the documentary proofs an easement of access in plaintiff to the Atlantic Basin, a right which seems to be conceded by defendant, and we thus have presented an interesting and important question of law, on undisputed evidence, as to whether the defendant is invading that easement.

The evidence relating to the four piers that have been erected inside of the basin since the deed of 1848 is wholly immaterial and has no bearing upon the legal question presented by this appeal. If the plaintiff or any other abutters upon the basin saw fit to allow the construction of those piers by express permission or without protest, that fact confers no right upon the defendant to erect other structures.

The sole question now presented is, what were the legal rights of the plaintiff under its title deeds, and the maps explaining the same, at the time this action was begun.

There is a further objection to the dismissal of the appeal, based on the fact that the prevailing opinion discusses the merits of this controversy and decides the only question in the case against the plaintiff.

This portion of the opinion is doubtless *obiter dictum*, yet if the dismissal of the appeal is, as intimated, an act of grace to the plaintiff, it should be permitted to depart the court in pursuit of any supposed remedy that may survive this decision, untrammelled by a hostile discussion of the merits.

I vote against the dismissal of the appeal on the ground that only a question of law is before the court which it must decide.

PARKER, Ch. J., GRAY and HAIGHT, JJ., concur with O'BRIEN, J.; BARTLETT, J., reads dissenting opinion; CULLEN and WERNER, JJ., absent.

Appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. J. B. LYON COMPANY, Appellant, v. JOHN T. McDONOUGH et al., Constituting the Printing Board of the State of New York et al., Respondents.

1. PUBLIC OFFICERS — WHEN STATUTES IMPOSING DUTIES UPON, ARE NOT REQUIRED TO BE LITERALLY PERFORMED IN UNESSENTIAL PARTICULARS. Where a statute or ordinance requires the performance by public officers of a certain specified act, or that it shall be performed in a certain specified manner, they must at least substantially comply with these requirements to render their acts valid. But such a statute or ordinance is not required to be literally performed in unessential particulars, where there has been a substantial compliance which answers the purpose or intent of the statutory requirements.

2. STATE PRINTING LAW — WHEN FORM OF GUARANTY ATTACHED TO PROPOSAL FOR CONTRACT FOR LEGISLATIVE PRINTING SUFFICIENTLY COMPLIES THEREWITH — UNIMPORTANT VARIANCE IN BID — LEGISLATIVE CONSTRUCTION. A contract made for legislative printing in strict accordance with the State Printing Law (L. 1901, ch. 507), in which the only defect claimed is that the proposal of the lowest bidder, to whom the contract was awarded, did not have a guaranty indorsed thereon in the precise language of section 5, requiring "a satisfactory guaranty for the proper performance of the contract," although the guaranty was in the

form required by the State Printing Board as prescribed by section 10, relating to department printing, but requiring precisely the same guaranty as section 5, and was to the effect that if the bidder's proposal was accepted it would enter into a contract in compliance with it and give the necessary security, is valid, the guaranty being a sufficient, although not a literal, compliance with the requirements of the statute; since such defect must be regarded as an unimportant variance in the proposal, especially where the legislature, having in section 10 set forth a form which it regarded as a sufficient compliance with the provisions of the required guaranty, must be regarded as having construed the meaning of the words used in section 5.

3. INTENT OF STATUTE. The purpose of the statute was not that the performance of the final contract should be guaranteed before it was made, but that the contract or agreement involved in the proposals should be performed by entering into the final contract and giving the necessary security, thus preventing "straw" bids. Nor is a double guaranty of the performance of the final agreement required; when the second guaranty is given it supersedes the first, and such is the intent and purpose of the statute.

People ex rel. J. B. Lyon Co. v. McDonough, 76 App. Div. 257, affirmed.

(Argued December 1, 1902; Decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 14, 1902, confirming a determination of the state printing board which awarded the legislative printing to the respondent The Argus Company.

The facts, so far as material, are stated in the opinion.

Franklin M. Danaher for appellant. The statute prohibits the printing board from receiving or considering a bid to do the legislative printing which has not annexed thereto a statutory guaranty for the proper performance of the contract signed by a duly certified guarantor. (L. 1901, ch. 507.) If the statute under which a public officer contracts prescribes any special formalities for the making of the contract, they must be complied with. A failure in this regard makes the contract utterly void. The action of the printing board in awarding the contract in question to The Argus Company, which failed to comply with the statutory requirements that it should annex to its bid a satisfactory guaranty for the

proper performance of the contract, and the contract itself are void, and the determination of the printing board in the premises should be annulled. (Mechem on Public Officers, §§ 501, 511, 522, 661, 663, 828, 830, 833, 834; *Wells v. Town of Salina*, 119 N. Y. 287; *Smith v. New York*, 10 N. Y. 504; *Walsh v. Mayor, etc.*, 113 N. Y. 142; *Matter of Clamp*, 33 Misc. Rep. 250; *L. E. Co. v. Syracuse*, 33 Misc. Rep. 516; *People ex rel. v. Thompson*, 19 Wkly. Dig. 455; *Walsh v. Mayor, etc.*, 23 J. & S. 536; *Russ v. Mayor, etc.*, 12 N. Y. Leg. Obs. 38; *Brady v. Mayor, etc.*, 20 N. Y. 312; *Cowen v. Vil. of West Troy*, 43 Barb. 49.) A public officer, where his authority is defined and limited by statute, has no discretion. He cannot ignore and dispense with a statutory limitation on his power in letting public contracts and then excuse his dereliction by the plea that he complied with the real meaning and true intent and purpose of the provisions of the statute. (*Brady v. Mayor, etc.*, 20 N. Y. 312; *McDonald v. Mayor, etc.*, 68 N. Y. 23; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Mahan Case*, 20 Hun, 302; 81 N. Y. 621; *Vil. of Fort Edward v. Fish*, 156 N. Y. 374; *Russ v. Mayor, etc.*, 12 N. Y. Leg. Obs. 38; *Smith v. Mayor, etc.*, 10 N. Y. 504.) There is no duty or requirement placed by law on the printing board to furnish to bidders a blank form of guaranty. Bidders are chargeable in law with notice of the statutory requirements as to proposals, and the fact that the blank form of proposal furnished by the printing board failed to have annexed thereto the guaranty required by statute is no excuse for its omission by The Argus Company, and no answer to the contention that its proposal was void for want of the same. (*Smith v. Mayor, etc.*, 10 N. Y. 504; *Walsh v. Mayor, etc.*, 23 J. & S. 536.)

Amasa J. Parker, Jr., for The Argus Company, respondent. The legislature expressly defined a form for the guaranty such as the printing board provided and The Argus Company used. (L. 1901, chap. 507; Black on Interp. Laws, 189; *Pitte v. Shipley*, 46 Cal. 161; *James v. Du Bois*, 16 N. J. L.

293; *Rhodes v. Weldy*, 46 Ohio, 234; *Raymond v. Cleveland*, 42 Ohio, 234; Bishop on Written Laws, § 95a; *Cortauld v. Legh*, Eng. Ch. 126; Hardcastle on Stat. Law, 219; Endlich on Interp. Stat. § 35; Southerland on Stat. Const. § 255; *F. Bank v. Hale*, 59 N. Y. 53.)

MARTIN, J. This proceeding was instituted by a certiorari to review the action of the printing board. The relator, the J. B. Lyon Company, the respondent The Argus Company, with others were bidders for the legislative printing for the year commencing October 1, 1902. The lowest bid was made by, and the contract was awarded to, The Argus Company. The relator claims that the bids of The Argus Company and other competing bidders were not made in conformity with the provisions of the State Printing Law, Laws 1901, chapter 507.

By this proceeding it is sought to have the action of the printing board in awarding the contract reviewed and the contract annulled. The Argus Company was, upon its own application, made a party to this proceeding. Upon the return of the printing board, the answer of The Argus Company, and after hearing and considering the argument of the respective parties, the Appellate Division duly affirmed the action of the board.

The statute under which the bids were made and the contract awarded divides the state printing into three classes: Legislative printing, department printing, and the printing of the session laws. Section five relates to proposals and contracts for legislative printing, and provides that the state printing board shall advertise in newspapers printed in certain specified cities in the state that it will receive proposals for the legislative printing for the year commencing October first; and that upon receiving such proposals it shall enter into a contract with the person, corporation or firm making the lowest bid. It is also required to furnish all persons desiring to bid for such printing with blanks, which shall properly set forth the various items upon which bids will be

received, as provided and described in the notice of publication. The statute also declares: "To every bid there shall be annexed a satisfactory guaranty for the proper performance of the contract by a guarantor, certified by the county judge of the county, or a supreme court judge of the district where the guarantor resides, that said guarantor is a freeholder and able to make good his guaranty, together with a certified check, cash or New York draft to the amount of twenty thousand dollars."

The only objection raised to the bid of The Argus Company, or the contract made with it, is that the former did not comply with the foregoing provision requiring the annexation of a satisfactory guaranty for the proper performance of the contract. The guaranty furnished was as follows: "I hereby guarantee that if the foregoing bid for the public or Legislative printing is accepted, that they (The Argus Company) will enter into a contract in compliance with said proposals, and give the necessary security." Thus, instead of using the specific words set forth in the statute, there was indorsed upon its bid a guaranty that it would enter into a contract in compliance with the proposals and give the necessary security.

It is urged by the relator that as the state printing board was a body created by statute, it had no power to award a contract upon any bid which did not literally comply with the requirements of the statute. The obvious purpose of the statute in requiring this guaranty was to assure a responsible bidder for its printing contracts, to prevent frauds, and to avoid bids by irresponsible persons, firms or corporations. If that was the purpose of the statute, then when The Argus Company furnished a guaranty to enter into the contract in compliance with the proposals of the board, it had in all essential particulars complied with the act and assured the object sought to be thereby attained. The guaranty that it would enter into the contract in compliance with the proposals could mean nothing less than that the company would make a contract which would bind it to carry out the pro-

visions contained therein, and, hence, it was in effect a guaranty of the proper performance of the contract. That the company's guaranty was a sufficient compliance with the statute is plainly indicated by other provisions of the act. In providing for bids or proposals for the other two classes of printing, the department printing and the printing of the session laws, which were provided for by sections ten and eleven of that act, we find that the statute requires precisely the same guaranty as is required by section five, and that in section ten the form of the guaranty to be attached to proposals for department printing, where the statute also requires "a satisfactory guaranty for the proper performance of the contract," is given. The guaranty there provided for is in all essential particulars identical with that indorsed upon the proposals of The Argus Company, and was entirely identical with that contained in the proposals furnished by the state printing board under the provisions of section five. While section five does not set out the form of the guaranty to be furnished, section ten does. Therefore, we find that the legislature, in the same statute, has set forth a form which it regarded as a sufficient compliance with the provisions of the required guaranty under another section of the statute which was identical in terms with that contained in section five. Thus we have the legislative construction of the meaning of its own words, which it would seem could be safely adopted by the courts.

As we have already seen, the principal contention of the appellant is that the statute prohibits the printing board from receiving or considering a bid to do the legislative printing which has not annexed thereto a guaranty in the language of section five. It insists that this statute is mandatory, and unless its provisions as to the guaranty were strictly and literally complied with, the printing board had no authority to consider the bid or proposals of The Argus Company, or to award to it the contract for the legislative printing. Among others, it cites as sustaining that doctrine the following cases: *Smith v. Mayor, etc., of N. Y.* (10 N. Y. 504); *Brady v. Mayor, etc., of N. Y.* (20 N. Y. 312); *Brown v. Mayor, etc.,*

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

of *N. Y.* (63 N. Y. 239); *McDonald v. Mayor, etc., of N. Y.* (68 N. Y. 23); *Parr v. Village of Greenbush* (72 N. Y. 463); *Dickinson v. City of Poughkeepsie* (75 N. Y. 65); *Smith v. City of Newburgh* (77 N. Y. 130); *Lyddy v. Long Island City* (104 N. Y. 218); *Walsh v. Mayor, etc., of N. Y.* (113 N. Y. 142); *Wells v. Town of Salina* (119 N. Y. 280); *People ex rel. Coughlin v. Gleason* (121 N. Y. 631); *Ziegler v. Chapin* (126 N. Y. 342); *Kramrath v. City of Albany* (127 N. Y. 575); *Village of Fort Edward v. Fish* (156 N. Y. 363).

Before proceeding further with the discussion of the question involved, it is perhaps proper to examine the cases to which we have referred and ascertain the doctrine established by them, and thus determine whether the appellant's contention is actually sustained by these authorities.

In the *Smith* case, where an ordinance required security for the performance of a contract in double the sum stated in the proposal, it was held that security in general terms for the faithful performance of the contract was not a substantial compliance with the ordinance, and the common council was not bound by such bid *until* it was approved and ratified, and that it was not obliged to accept or ratify the contract under those circumstances. In *Brady v. Mayor*, bids were invited for grading and paving a street upon an estimate by which the bids were to be tested. The estimate did not include any rock excavation, although bids for such excavation, if any should be needed, were called for, and it was held that a contract awarded upon such estimate was illegal, the lowest bidder not being capable of ascertainment, and that the confirmation by the common council of an assessment based upon such illegal contract did not give it validity as against the corporation. The *Brown* case is to the effect that the legislature has power to ratify a contract entered into by a municipal corporation for a public purpose which is *ultra vires*, and thus ratified it is valid and binding. In *McDonald v. Mayor* it was held that where, at the request of the superintendent of roads, the plaintiff delivered certain stone and gravel to be used in

repairing the streets, he could not recover the value against the city where it was not alleged or proved that a necessity for the materials was certified to by the department of public works, or that the expenditure was authorized by the common council, or that a contract was entered into with the lowest bidder after publication as required by the charter. In the *Parr* case it was held that where there was no provision in the village charter requiring the contract to be in writing, it might be made by a simple resolution of the board accepting the proposition, or by a resolution specifying the terms of the contract assented to by the other party. Where the law requires municipal officers, before entering into contracts, to advertise and to contract with the lowest bidder, a contract made without complying with those requirements imposes no obligation upon the municipality. In the *Dickinson* case, where the statute required the contract to be let to the lowest bidder who should give due security upon public notice of proposals, it was held that any other contract was wholly unauthorized and void; also, that where one of the competitors was allowed to alter his bid to make it appear lower than that of the others, and then, after acceptance of this bid, a contract was made at higher prices, with a large number of prices stipulated for therein not in the competition at all, and with a material clause inserted to the benefit of the contractor, in no manner contemplated by or offered to the other bidders, held that the contract was unauthorized and void, and did not confer upon the contractor any right of action, and that no recovery could be had upon *quantum meruit*. In *Smith v. Neuburgh*, where the statute authorized the common council of the city to improve its water works, and no power was given to the council to lease premises for the purpose, where the rent was more than ten thousand dollars, without notice published and a special election held, it was decided that a lease executed in contravention of the statute was void and could not be enforced against the city. In that case it is said that where the officers of a municipal corporation fail to pursue the strict require-

ments of a statutory enactment in contracting for the municipality, it is not bound, nor is it bound by any acts of its officers in ratification of its illegal contract, and that a person dealing with a municipal body is bound to see that the provisions of the statute under which it is acting are fully complied with, and if this is not done, no subsequent act of the municipal officers can make the contract effective. The *Lyddy* case is to the effect that a person can contract with a municipal corporation only through its authorized agents, and is chargeable with notice of the limitations upon their official authority imposed by general laws. Where the common council has no authority to create a liability against it by express contract, it cannot legalize such a claim by acknowledgment, ratification or otherwise. In the *Walsh* case, where the statute awarded to the lowest bidder for the same with adequate security, contracts by the city, and provides that every contract should be confirmed in and to such lowest bidder at the time of opening the bids, and such contract should be forthwith executed with such lowest bidder, it was held that the statute did not compel the making of a contract by the city with such lowest bidder; that while no contract could be let to other than the lowest bidder, the body awarding it, acting in good faith, might refuse to award it to him if they deemed it for the best interest of the city to do so, and might reject all bids and readvertise. *Wells v. Town of Salina* is to the effect that the powers of towns or municipal corporations organized for governmental purposes are limited and defined by the statutes under which they are constituted, and they possess only such powers as are expressly conferred by statute or necessarily implied, and it also holds that the defendant had no general power to borrow money for municipal purposes or to pay town charges. In *People ex rel. Coughlin v. Gleason* it was held that where a municipal charter provided that contracts for work should be let to the lowest responsible bidders the officials authorized to let a contract might not arbitrarily reject the lowest bid and accept a higher one without facts tending to show that the lowest

bidder was not responsible or at least some pretense to that effect, and that a contract thus let was illegal and the relator could not recover for the work performed under it, even though allowed by the common council, as it had no jurisdiction to do so. In the *Ziegler* case, where the statute authorized the city of Brooklyn to purchase certain water works, and in case it was unable to do so to condemn the same within two years, it was held that it was the duty of the officials to attempt an agreement with reasonable promptness, and if unsuccessful, to commence proceedings for condemnation, and that the authority to purchase did not extend beyond the two years allowed for such proceeding. In *Kramrath v. City of Albany* it was held that a municipal corporation may be bound upon an implied contract, within its corporate powers, made by its agents and to be deduced from corporate acts without the vote of the governing body, unless the contract be one which the charter or law governing the corporation requires shall be made in a particular manner. In the *Village of Fort Edward* case this court held that where the statute forbade the disposition of bonds at less than their par value, commissioners of the village had no authority to sell them at less than the amount of the bonds, with accrued interest.

This review of the authorities in this court, upon which the appellant relies for a reversal of the action of the court below, discloses that none of the cases referred to upholds the principle contended for when the actual determination is considered, whatever of obiter may be found therein. They do, however, sustain the proposition that, where a statute or ordinance requires the performance by public officers of a certain specified act, or that it shall be performed in a certain specified manner, they must at least substantially comply with these requirements to render their acts valid. But such a statute or ordinance is not required to be literally performed in unessential particulars, where there has been a substantial compliance which answers the purpose or intent of the statutory requirements. If the statute is substantially complied with and its actual purpose secured, especially where it has

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

been acted upon and a proper contract in pursuance of it has been entered into, such as the statute requires, an unimportant variance in the proposed bid does not render the contract invalid. In this case a contract was made in strict accordance with the statute, and the only defect claimed is that the proposal of the lowest bidder, to whom the contract was awarded, did not have a guaranty in the precise language of the statute indorsed thereon, although it was in the form required by the printing board. The guaranty was to the effect that, if the bidder's proposal was accepted, it would enter into a contract in compliance with it and give the necessary security. After the bid was accepted, that was all the company was required to do, and obviously all that the statute intended that the successful bidder should do. We do not agree with the appellant's contention that its purpose was to require security for the performance of the contract before it was awarded, or it was known that it would be awarded, to the party with whom the contract was made. The more reasonable and fair construction of this statute seems to be that the purpose of the guaranty was to secure and provide that the bidder, if successful, should enter into a contract and give the necessary security for its fulfillment, thus preventing the making of "straw bids," which, if accepted, would not be carried into effect. We think its purpose was not that the performance of the final contract should be guaranteed before it was made, but that the contract or agreement involved in the proposals should be performed by entering into the final contract and giving the necessary security. Nor do we think it was the intent of the statute that there should be a double guaranty of the performance of the final agreement. When the second guaranty was given, it would doubtless supersede the first and such was the intent and purpose of the statute. Although it may be that the printing board might possibly have refused to award the bid to The Argus Company upon the ground that its proposal was not according to the literal wording of the statute, and might have readvertised the letting under its general provisions giving the board that right, yet, we do not think it

would have been justified, without such reletting, in refusing to enter into a contract with The Argus Company, or in awarding the printing to the relator, who was not the lowest bidder, simply because the guaranty indorsed upon the bid of The Argus Company was unlike that of the relator, especially as the guaranty actually executed was furnished by the board and was in substantial compliance with the statute.

We are of the opinion that the learned Appellate Division properly confirmed the determination of the state printing board, and that its judgment or order should be affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, VANN, CULLEN and WERNER, JJ., concur.

Order affirmed.

CORDELIA D. CHAUVET et al., Appellants and Respondents,
v. MARGARET SEAMAN IVES, Respondent and Appellant.

1. DEVISEES — COMPROMISE AGREEMENT — CREDIT OF PAYMENTS. Devisees under a will valid as to personal property, but void as to real estate, may, if competent to contract, agree between themselves how much in the aggregate each shall receive from the entire estate, and all payments made thereunder to each of them from the property, whether real or personal, including income from the personalty or rents from the realty, should be credited upon the sum which they agreed to accept in full.

2. HEIRS — AGREEMENT — CONSTRUCTION. An heir who, by agreement with another, is to receive any surplus of the latter's share over a given sum and is to make up any deficiency if it falls below it, and who further guarantees the payment of such amount upon the distribution of the estate, simply undertakes to make up to the other any portion of the designated sum that may not be realized from the proceeds of the estate.

3. INTEREST. One heir, who, by a compromise agreement, undertakes to make up to another any deficiency if the latter's distributive share is less than a specified amount, is not chargeable with interest in the absence of an agreement therefor, until the distribution of the estate is completed and the deficiency is ascertained and payable.

Chauvet v. Ives, 62 App. Div. 389, affirmed.

(Argued December 11, 1902; decided January 6, 1903.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered September 27, 1901, modifying, and affirming as modified, a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury.

It was alleged in the complaint that in consideration of the transfer by the plaintiffs to the defendant of all their rights, claims and demands to the estate, real and personal, of which the late Francis W. Lasak died seized, the defendant promised to "pay to the said plaintiffs the sum of \$180,000, and" to "guarantee the payment to said plaintiffs from the proceeds of said estate the said sum as above mentioned;" that defendant had neglected and refused to pay the sum mentioned. Judgment was thereupon demanded for that amount with interest from the date of the agreement. The trial court rendered judgment in favor of the plaintiffs for \$27,147.21, besides costs. The Appellate Division reduced the recovery to the sum of \$9,652.29, besides costs, by deducting certain distinct items, and as thus modified, the judgment was affirmed. Both parties appealed to this court. The further material facts are stated in the opinion.

Stillman F. Kneeland and *Charles C. Thorne* for plaintiffs, appellants and respondents. The plaintiff was improperly charged with the sums of money received by her after June 16, 1892, and designated as rents or income from the real estate. (*Texier v. Gouin*, 5 Duer, 389; *Dickinson v. Devlin*, 14 J. & S. 232; *Potter v. Gates*, 29 N. Y. S. R. 662; *Hall v. Olney*, 65 Barb. 27.) The defendant is liable for interest from the date of the agreement and transfers. (*Woertz v. Schumacher*, 37 App. Div. 374; *Purdy v. Phillips*, 11 N. Y. 406; *Farquhar v. Morris*, 7 T. R. 124; *Chester v. Jumel*, 125 N. Y. 237; *Gillet v. Van Rensselaer*, 15 N. Y. 397; *Stevenson v. Maxwell*, 2 N. Y. 408; *Viele v. T. & B. R. R. Co.*, 21 Barb. 381; *Cleveland v. Burrill*, 25 Barb. 532.)

Michael H. Cardozo, Henry W. Bookstaver and Algernon S. Norton for respondents. The decision in the *Cuthbert* case is controlling and establishes the law of this case. (*N. Y. L. Ins. Co. v. Cuthbert*, 31 App. Div. 191.) The undertaking of the defendant was to make good a deficiency, not to pay a particular sum, and until such deficiency was ascertained and fixed no claim existed against her. (*Nicoll v. Sands*, 131 N. Y. 19; *Ins. Co. v. Dutcher*, 95 U. S. 269; *Cuthbert v. N. Y. L. Ins. Co.*, 160 N. Y. 705.)

VANN, J. By a will and seven codicils Francis W. Lasak, a resident of Westchester county, attempted to dispose of a large estate consisting of both real and personal property. Upon his death in 1889 litigation arose over his will and finally several agreements were entered into by those interested which provided for the distribution, through voluntary action and without resort to the courts, of the entire estate, real and personal, and the settlement of all controversies then existing between the parties.

This compromise seems to have caused more litigation than it aimed to prevent. (*New York Life Insurance and Trust Co. v. Cuthbert*, 31 App. Div. 191; affirmed on opinion below, 160 N. Y. 705; *Chauvet v. Ives*, 52 App. Div. 411; *S. C.*, 62 App. Div. 339.) Both parties now come before us as appellants, and we sympathize with their desire that our decision should finally end the dissension created by their efforts to compose their differences and prevent litigation.

According to the will and the various codicils one-third of the residuary estate was left in trust for the plaintiff Cordelia during her life, and upon her death \$50,000 of this trust fund was given to the plaintiff Albert, her son, and the balance to charity, with the proviso that Albert, with the consent of his mother, might be paid his legacy before her death. This consent was afterwards given in due form.

By the first agreement, dated December 3d, 1891, the estate was estimated, "as a basis of settlement," to be of the value of \$1,100,000, consisting of \$250,000 in personal and \$850,000

in real property. As at first proposed and as signed by all parties in interest except the plaintiffs, it made a division of the entire estate, terminated all suits then pending and among other things provided for the payment of \$100,000 to the defendant and \$160,575 to the plaintiff Cordelia, including the bequest to the plaintiff Albert. Before signing it, however, the plaintiffs added thereto the following: "We agree to above on condition that we receive \$180,000 net, and that Mrs. Ives receive surplus, if any, under the will, and make up deficiency." The plaintiffs signed the agreement as thus amended, and thereupon the defendant assented thereto by signing the following statement written directly beneath their signatures: "I agree to modify the above agreement by accepting the conditions contained in above, signed by Mrs. Chauvet and Albert Chauvet." Each party agreed to execute such conveyances as were reasonably necessary to carry out the plan, and this was subsequently done.

A second agreement was entered into on the 16th of June, 1892, which provided, at great length, the method of distribution. The will, as already admitted to probate by the surrogate, was to stand so far the personal property was concerned, but was to be adjudged void by a proper decree as to the real estate. Many provisions were made which we will not repeat. It is sufficient to state that the real property was to be conveyed to Calvin Frost, who had proposed the scheme of settlement, and sold in partition or otherwise. One-fifth of the proceeds was to be paid to Mrs. Cuthbert, a daughter of the decedent, and four-fifths to Mr. Frost, out of which he was to pay to the administrator with the will annexed an amount sufficient with the proceeds of the personal property to meet the pecuniary legacies, including \$50,000 to the plaintiff Albert. The remainder was to be divided into thirds, one of which, after certain deductions, was to be paid by Mr. Frost to Mrs. Cuthbert, and another third, after certain deductions, to Mrs. McKenzie. Out of the remaining third he was to make various payments, including \$130,000 to the plaintiff Cordelia, "and the balance of said one-third share to" the defendant.

The agreement then provided as follows: "If the last mentioned one-third share shall be insufficient to pay the said sum of \$130,000 to Cordelia D. Chauvet, the deficiency therein shall be made up by Mrs. Margaret Seaman Ives, to whom, it is agreed, shall belong and be paid and delivered, any and all payments, property and moneys which, excepting for this agreement, might belong, be paid or delivered to Mrs. Cordelia D. Chauvet and Albert L. Chauvet, or either of them, directly or contingently, out or from the estate left by said Francis W. Lasak, deceased."

On the same day the heirs conveyed to Mr. Frost as agreed. On the same day also a third agreement was made by which, after referring to the second, and reciting that the plaintiffs had thereby released, conveyed and sold to the defendant all their rights to the estate, real and personal, left by Mr. Lasak "and the proceeds, upon the condition expressed in said agreement that there be paid out of the proceeds of said estate a bequest of \$50,000 to Mr. Chauvet and the sum of \$130,000 to Mrs. Chauvet," the plaintiffs ratified and confirmed the transfer to the defendant of "all and singular the rights, claims and demands which they have or either of them has or may have to or in the estate, real and personal, which was of the late Mr. Francis W. Lasak, deceased, or any part thereof and the proceeds thereof."

The agreement closed with the following paragraph: "Mrs. Ives ratifies and confirms to Mrs. Chauvet and to Mr. Chauvet the promises of the payments to be made to them respectively, as provided in said agreement, and Mrs. Ives further agrees that if, upon the sale and conversion into money of the said estate, real and personal, which was of the late Mr. F. W. Lasak, deceased, said estate upon such sale and conversion into money realizes and produces more than the sum of \$1,200,000, that she, Mrs. Ives, will, upon the receipt by her of the sums to which she is entitled under said agreement and out of the same, pay over to Mrs. Chauvet a sum equal to ten per cent of the sum in excess of \$1,200,000 produced and realized upon the sale and conversion into money of said estate."

On the 20th of June, 1892, a fourth agreement followed, which provided that the sum of \$82,000, which by the agreement of June 16th was to be paid to two charitable societies out of the last third already alluded to, should be a prior lien upon the \$130,000 payable to Mrs. Chauvet "and first paid, and the undersigned, Margaret S. Ives, hereby guarantees the payment of the same, and of the amount coming to Mrs. Chauvet, \$180,000."

On the 6th of May, 1893, the fifth agreement was made in the form of a letter addressed to Mrs. Chauvet and signed by the defendant, declaring that "in consideration of your signing the agreement with me, dated the 4th day of March, 1893, I agree that you (with Albert) will be paid and receive the sum of \$180,000 upon the distribution of the estate under the arrangement between the parties, together with the amount of counsel fees agreed on." No agreement of March 4th appears in the record, but an agreement, dated March 3rd, 1893, signed by the defendant, was read in evidence. Its provisions are not regarded as important on this appeal. The New York Life Insurance and Trust Company, as administrator with the will annexed, refused to sign any of the agreements.

This action was brought by Mrs. Chauvet and her son, as plaintiffs, to recover said sum of \$180,000, with interest thereon from the 16th of June, 1892. Various payments have been made to the plaintiffs, both directly and in trust for them, but they claim that no part thereof should be credited except those made directly to them after June 16th, 1892, the date of the second agreement, and that they should receive interest from that date. Upon the theory that the will was valid as to the personal property, the trial court, owing to his construction of a previous decision of the Appellate Division, held that the income received by the plaintiffs therefrom was their property and should not be applied upon the principal sum of \$180,000, although he held that all other sums received by them, whether from real or personal property, or before or after the agreements, should be thus

applied. The defendant claims that this was erroneous as to the income from the personal property, and the plaintiffs claim that it was erroneous as to the rents from the real property. The Appellate Division held that the parties "interested in the estate intended to make disposition of the whole thereof, personal as well as real; and that the \$180,000 agreed to be paid to the plaintiffs represented the entire sum which they should receive for their interest in the entire estate."

We agree with the Appellate Division. The fact that the will was valid as to personal property did not prevent the parties, all of whom were competent to contract, from agreeing as between themselves how much in the aggregate each should receive from the entire estate, both real and personal. As all the agreements relate to the same subject, they should be read together, and when thus read they show a clear and unmistakable intent to dispose of all the property left by the decedent, and that the plaintiffs' share thereof should be the net sum of \$180,000. The defendant was to take what was left of the share which, but for the agreements, would have gone to the plaintiffs, and in consideration thereof she was to guarantee to them the sum agreed upon. She was, according to the first agreement, to "receive surplus, if any, under the will, and make up deficiency." That is, if the share of the plaintiffs in both real and personal, provided no agreement had been made, would have exceeded \$180,000, the defendant was to have the surplus, and if it fell below that sum, she was to make it up. The distinct mention of the will excludes the theory that the plaintiffs could receive anything under it, unless it was credited upon the amount they agreed to accept in full and which they required the defendant to guarantee should be paid. The deficiency is again referred to, in terms, in the second agreement, which provides that the defendant is entitled to "any and all payments, property and moneys which, excepting for this agreement, might belong" to the plaintiffs, "or either of them, directly or contingently, out or from the estate left by said Francis W. Lasak, deceased." The third agreement ratified and confirmed the previous

transfer by the plaintiffs to the defendant of all their rights, joint and several, to the estate, "real and personal, which was of the late Mr. Francis W. Lasak, deceased, or any part thereof and the proceeds thereof, upon the condition that the plaintiffs be paid out of the proceeds of said estate" the sum of \$180,000. The defendant also ratified her previous promises to the plaintiffs and agreed that if the entire estate, including real and personal property, when converted into money, amounted to more than \$1,200,000, the defendant should, upon the receipt by her of the sums to which she was entitled under the agreement, pay over to the plaintiff Cordelia a certain percentage of the excess. A latitude of \$100,000 above the estimate "as a basis of settlement" mentioned in the first agreement, was thus allowed before any liability for the percentage arose. The fourth and fifth agreements emphasize the fact that from all sources the plaintiffs were to receive but \$180,000 in full of their shares in all the property left by their ancestor. Mrs. Chauvet seems to have had one leading idea in her mind throughout all the negotiations and in making all the agreements, and that was that she and her son should in any event receive the net amount of \$180,000, and that all that remained of what they would otherwise have been entitled to receive under the will, as heirs at law, next of kin, or through the agreements, was to go to the defendant. All payments, therefore, at any time made to the plaintiffs, or for their benefit with their consent, from the property left by the decedent, whether real or personal, "or any part thereof and the proceeds thereof," including income from the personal and rents from the real, should be credited upon the sum which they agreed to accept in full of their claims of every kind.

This conclusion accords with our construction of the first agreement when we considered it in the *Cuthbert Case* (31 App. Div. 191; 160 N. Y. 705). While the later agreements were not then before us, they confirm and emphasize the intention expressed by the parties in their first attempt to avoid litigation. The scheme of distribution and settlement

provided for by the first agreement was worked out and carried into effect by those subsequently made. The modifications relate to details and do not affect the principle upon which our former judgment was based.

The plaintiffs claim interest from various dates; in their complaint, from June 16th, 1892, the date of the second and third agreements, and in their points from that date as well as from July 1st, 1894, the date when, as the court found, Mr. Frost received "a sum exceeding \$180,000" from the estate of Mr. Lasak; from November 22d, 1894, when it was asserted but neither found nor proved, Mr. Frost distributed the fund, and from December 1st, 1894, when, as was found, the plaintiffs demanded payment of him. The defendant claims her undertaking was not to pay a definite sum, but to make good a deficiency, and that until such deficiency is ascertained by an accounting with Frost or his executors, there can be no recovery of either principal or interest.

The trial court found that "it does not appear that the entire estate * * * has ever been accounted for or distributed," or "that the plaintiffs, or either of them * * * ever demanded of the defendant the payment of the moneys sued for in this action, or any part thereof." No mention of interest is made in any of the agreements. There is no evidence that the defendant caused any delay in the distribution of the estate, or that when demand was made of Mr. Frost he had enough money on hand, applicable to the plaintiffs' claim, to satisfy it. While he had \$180,000 on hand, less than one-third thereof could, according to the agreements, be applied upon the demand of the plaintiffs.

The nature of the defendant's promise is not free from difficulty. The plaintiffs seem to have been in doubt when they commenced the action, for in the same sentence of their complaint they allege an absolute promise and a guaranty of payment from the proceeds of the estate. By the first agreement the defendant was to receive the "surplus," if any, "and make up (the) deficiency." The second provides that any "deficiency" remaining after Mr. Frost should make distri-

bution, should be "made up" by the defendant. The third recites as the condition upon which the plaintiffs had transferred their rights to the defendant "that there be paid out of the proceeds of said estate a bequest of \$50,000 to Mr. Chauvet and the sum of \$130,000 to Mrs. Chauvet." By the same agreement the defendant also confirmed to the plaintiffs the promises made to them in the second. By the fourth, the defendant, in terms, "guarantees the payment * * * of the amount coming to Mrs. Chauvet, \$180,000." In the fifth the defendant promises that the plaintiffs should "be paid and receive the sum of \$180,000 upon the distribution of the estate under the arrangement between the parties."

While the promise of the defendant was not collateral in the ordinary sense of that word as used with reference to the Statute of Frauds, it impresses us as collateral in nature and substance. It was not primarily for the default of an individual, although it necessarily extended to any default of Mr. Frost, but it was to make up what the estate did not pay of the sum named. If there was a failure of the estate to pay in full the defendant agreed to guarantee the payment of the deficiency. The use of the words "guarantee," "make up," "surplus" and "deficiency," and of the expressions "upon the distribution of the estate," "from the proceeds of the estate" and the like, are significant.

It seems strange at first that the plaintiffs should be charged with rents and income and yet interest should be withheld from them, but they preferred a certainty to an uncertainty, to accept the sum of \$180,000 in any event rather than take the chances that their estimated share, which was but \$160,575, should turn out better than was expected, and they would not sign the agreement until it was amended accordingly. Under these circumstances the omission of the promise to pay interest in a compromise agreement has some bearing upon the intention. While it is true that from certain parts of the instrument, considered by themselves, the transfer of their rights by the plaintiffs to the defendant seems absolute, entire and *in præsenti*, we think that upon reading all the agree-

ments together the more reasonable construction is that the intention was to transfer what was left of the plaintiffs' share after the payment therefrom of the \$180,000, and that if a deficiency then arose the defendant was to make it up. She did not promise to pay that large sum immediately, or at any particular time, or unconditionally, but only so much thereof as the estate did not pay. Clearly she could not have been sued the day after the agreements, or any of them, were made, for nothing was then due. When did anything in fact become due? She was not to pay a lump sum at once, but to make up a deficiency, if one arose, after the estate had been distributed. She could not make up the deficiency until she knew what it was. So far as appears she had no means of paying except as the estate was distributed, and the scheme of distribution required time, for there was much real estate to be sold "in partition or otherwise." Her liability was not founded upon a mercantile instrument, but upon a compromise agreement, made between the heirs of an estate in order to prevent litigation. As she did not agree to pay interest, she was not liable for interest until the obligation was due, nor until she could ascertain by computation, or otherwise, the amount that she was to pay. How could she tell whether there would be any deficiency, or the amount thereof if there was one, until after Mr. Frost had accounted? Until he made his division, her obligation was unliquidated. The plaintiffs were certainly entitled to share in the distribution to be made by him. They did not transfer to the defendant all their rights in the large fund in his hands, but only to the surplus, if any, after they had been paid the amount which they agreed to accept. They did not sell their share of the proceeds of the estate, but only what was left after they had been paid in full. They reserved the right to receive from Mr. Frost \$180,000, or whatever their proportion amounted to, and to require him to account therefor. They could not tell how much the defendant was liable for, nor could she know how much she would be obliged to pay until the estate was distributed, because the amount of the deficiency, if any

N. Y. Rep.]

Statement of case.

should arise, could not be sooner known. The intention of the parties was well expressed by the learned trial judge when he said: "It was that the sale and distribution of the estate should be proceeded with as proposed by Mr. Frost; that out of the proceeds of that sale the plaintiffs should receive, with the amounts realized by them or for their use out of the personal property, the sum of \$180,000, and that if the estate should not realize enough to make the amount coming to them, according to Mr. Frost's scheme of distribution, equal to \$180,000, then the defendant was to pay and make up to them the deficiency."

Without prolonging the discussion and after examining all the points presented by the plaintiffs, we announce as our conclusion that they have been awarded all of principal or interest that they are entitled to recover. This makes it unnecessary to consider the question raised by the defendant's appeal, whether the action was prematurely brought, since, in order to end the litigation, she consented on the argument that if the appeal of the plaintiffs was not sustained, her own appeal might be disregarded.

The judgment should be affirmed, but as both parties appealed, without costs to either in this court.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT and CULLEN, JJ., concur; BARTLETT, J., not voting.

Judgment affirmed.

THOUSAND ISLAND PARK ASSOCIATION, Respondent, v. ORA TUCKER, Appellant.

1. HIGHWAYS — WHAT CONSTITUTES DEDICATION OF LANDS OF RESIDENCE PARK ASSOCIATION — TRESPASS. The leasing for a long term of years of lots laid out on a map or plan of lands of a camp meeting and summer residence park association, showing such lots and the roads and streets to be used for access thereto, constitutes a dedication of the land in such streets and roads to the use of the lot lessees, and the association cannot maintain an action of trespass against a person using a road for access to the premises of a lessee for the purpose of delivering merchandise and supplies to the lessee at his request.

582.) Plaintiff is entitled to injunctive relief herein. (*Morrill v. State*, 38 Wis. 433; *Comm. v. Gardner*, 133 Penn. St. 289; *Graffy v. City of Rushville*, 107 Ind. 502; *Garvey v. L. I. R. R. Co.*, 159 N. Y. 332; *Coatsworth v. L. V. R. R. Co.*, 156 N. Y. 451; *Wheeler v. Noonan*, 108 N. Y. 179; *Hahl v. Sugo*, 169 N. Y. 117; *T. & B. R. R. Co. v. B., II. T. & W. R. Co.*, 86 N. Y. 126.) The rule or ordinance of the plaintiff association that "All trafficking in vegetables, meats, groceries, newspapers and all other articles of merchandise usually sold in the markets of the Association, or any huckstering whatsoever without permission on its docks and grounds is hereby prohibited," is a reasonable regulation of trade and is not arbitrary, oppressive or in restraint of trade. (*Vil. of Buffalo v. Webster*, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 327; *City of Brooklyn v. Breslin*, 57 N. Y. 593; *Meyers v. Baker*, 120 Ill. 567; *Comm. v. Barse*, 132 Mass. 542; *State v. Read*, 12 R. I. 135; *City of Buffalo v. Schliefer*, 2 N. Y. Supp. 216.)

CULLEN, J. The plaintiff was incorporated in December, 1874, under the provisions of chapter 117 of the Laws of 1853, entitled "An act to authorize the formation of corporations for the erection of buildings," under the name of "The Thousand Island Camp Meeting Association," for the purpose of erecting buildings and laying out land for the use of persons who might attend camp meetings on the grounds of the association. In 1875 it acquired a tract of about eight hundred acres on Wellesley Island in the St. Lawrence river, a part of which it laid out into parks or open squares and streets and the remainder thereof subdivided into lots. It graded the streets, improved the parks, or open spaces, constructed a dock and built a tabernacle and other buildings, including a hotel. It leased to individuals a large number of the lots for the purpose of erecting cottages thereon. These leases ran for ninety-nine years with the privilege of perpetual renewals, and by their terms were "granted and accepted according to the rules and regulations which may from time

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

to time be adopted and promulgated for the government of said park and which are hereby made part of the instrument." The leases specified that the regulations existing at their date and assented to by the lessees, were :

"1. No games or diversions of any kind, not approved by said association, will be allowed on any of the premises of the said association at any time.

"2. The association reserves the right, at all times, to use, lay out and lease all lands not already laid out or designated as streets or avenues.

"3. The erection of privies is forbidden ; except by consent of the association."

By chapter 4 of the Laws of 1879 the corporate name of the plaintiff was changed to its present title. By chapter 278 of the Laws of 1883 the plaintiff in addition to the powers conferred upon it by its act of incorporation was authorized "To purchase and deal in such provisions and other commodities and articles necessary and proper for supplying lot lessees, cottages and visitors, and to maintain stores, shops, lumber yards and other buildings and erections upon the corporate lands ; to establish and conduct livery stables, baths, bath-houses, boat liveries, boat houses and boats for hire ; to authorize others to engage in such pursuits on said park ; to make and establish regulations therefor ; to improve the corporate property in any and all ways calculated to contribute to the pleasure, health or well being of its lot lessees and visitors." By subdivision 6 of section 1, it was provided that nothing in the act should be construed to prevent the bringing of provisions, building or other materials upon the grounds of said association for the use of those bringing the same, and not intended for the purposes of trade or sale. In August, 1895, the trustees of the plaintiff enacted the following regulation : " All traffic in vegetables, meats, groceries, newspapers and all other articles of merchandise usually sold in the markets and stores of the association or any huckstering whatsoever without permission, on its docks and grounds, is hereby prohibited." The defendant is a farmer in Jefferson county

who has supplied lot owners in the park with poultry, vegetables and like products. The method in which he conducted his business was, as has been found by the trial court, by means of orders on postal cards sent to him by various lot owners. In compliance with such directions he delivered the goods ordered to the various persons ordering them on their respective premises. The complaint alleged the incorporation of the plaintiff, the improvement of its land, the lease of its lots and the enactment of its regulations against trafficking already recited. It further alleged that the plaintiff had leased a store, a meat market and other buildings to individuals, with a grant of the exclusive privilege of carrying on such business in the park; that the rental value of such premises depended largely upon the exclusive right so granted to the lessee to carry on the particular business. It was alleged that the defendant in violation of said regulation was trafficking in supplies sold in the stores and shops established by the plaintiff and thus injuring its exclusive right to carry on business. The relief asked was that the defendant be enjoined from trafficking, selling or delivering vegetables, meats, fruits, groceries and any other merchandise on the grounds of the plaintiff without its permission. The trial court found that the defendant had trafficked in vegetables and supplies under orders by post in the way narrated. It held that the plaintiff possessed the exclusive privilege of dealing in merchandise within the limits of the park; that the regulation adopted by it was reasonable and valid and that the conduct of the defendant violated such exclusive privilege. Judgment was granted enjoining the defendant from huckstering or trafficking in vegetables or other farm products for household use or other merchandise usually sold in the market or stores of the plaintiff and from continuing such traffic as theretofore conducted by him by means of mail orders and personal delivery of goods without first obtaining the permission of the plaintiff.

The real question involved in this case is the right of the plaintiff association to prevent the lessees and occupants of the plots which it has leased from obtaining their supplies by

purchase from others than the plaintiff or the persons to whom it has granted the exclusive privilege of dealing in such supplies. The action cannot be sustained on the theory that the defendant is a trespasser on plaintiff's lands, and that it is entitled to resort to equity to prevent a repetition of the trespass, unless it be first determined that he entered upon the park for the purpose of violating the plaintiff's right. Trespass on land can be maintained only by a plaintiff in possession. Therefore, so far as relates to the entry on the premises of the cottagers, the plaintiff has no standing to complain of a trespass. As far as the roads and streets in the park are concerned, the probability is that they were made public highways by chapter 242 of the Laws of 1895, which enabled the plaintiff to discharge its highway tax by work on those roads. In that case every one of the public had the right of passage over them. But however this may be, the lots leased were laid out on a map and plan of the park showing the streets and roads. By leasing the lots as designated on such maps the plaintiff thereby dedicated the land in the streets and roads to the use of the lot lessees, and any one using a road for access to the premises of such lessee on the latter's request can justify his presence there as against the plaintiff under such dedication. We, therefore, revert to the original question, whether the defendant's errand was lawful as against the plaintiff.

The real theory of the action and the ground on which the decisions of the courts below have proceeded is that the plaintiff had the exclusive privilege to furnish stores and supplies to residents in the park except in cases where the residents might personally bring their supplies with them, and that the defendant's conduct infringed on the plaintiff's exclusive privilege of trading or authorizing trading. The claim of the plaintiff to this exclusive privilege is based on two grounds: *First*, the statute of 1883; *second*, the covenants or conditions of the leases granted by it to the various holders of cottage plots. As to the first it would be sufficient to say that if the statute granted to the plaintiff the exclusive right claimed it

would be in conflict with section 18, article 3 of the Constitution, which prohibits the legislature from granting to any private corporation or association or individual any exclusive privilege, immunity or franchise whatever. (*Fox v. Mohawk & Hudson River Humane Society*, 165 N. Y. 517.) But the act of the legislature is not subject to any such construction. It does not purport to give the plaintiff any exclusive privilege of trading or to forbid others from so doing. It authorizes the plaintiff to purchase and deal in provisions and other commodities for supplying lot lessees and visitors and to maintain stores and shops for that purpose. Thus far it merely grants the plaintiff additional corporate powers, a grant which was necessary, for by the statute under which it was originally incorporated the plaintiff would have no right to carry on any business of the kind. It then empowers the plaintiff to authorize others to engage in such pursuits on the park and "To make and establish regulations therefor." I assume that by this statute there was given to the plaintiff the same power to regulate trade in the park that is generally granted to municipal corporations to regulate trade within their limits. More than this the legislature did not grant. The power to regulate a useful trade does not authorize its prohibition or the creation of a monopoly. "An ordinance cannot be legally made which contravenes a common right unless the power to do so be plainly conferred by legislative grant (with us the legislative power is restricted by the constitutional provision cited), and in cases relating to such a right authority to regulate conferred upon towns of limited powers has been held not necessarily to include the power to prohibit." (Dillon on Municipal Corporations, sec. 325.) "The power to license and regulate legal and necessary business will not give the corporation the power to make contracts which create or tend to create a monopoly." (Id. sec. 362.) The restraint or prohibition of hawking and peddling has always been regarded in this state as a justifiable exercise of the police power. (*Village of Buffalo v. Webster*, 10 Wend. 100; *Village of Stamford v. Fisher*, 140 N.

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

Y. 187.) As said by Judge GRAY in the latter case, "It is perfectly competent to empower municipal corporations to prescribe regulations for the orderly conduct of business within their limits and upon the public streets." Therefore, so far as the regulation adopted by the plaintiff forbade trafficking or huckstering in articles of merchandise on the dock, streets or open places, it was valid. It might also restrain peddling and similar trafficking in the park, for all these things would tend to interfere with the comfort of the residents and disturb the quiet and good order of the settlement. But the business done by the defendant did not in any way constitute hawking or peddling. This was so held in *Village of Stamford v. Fisher (supra)*. It in no way affected the order or quiet of the community. The defendant took his goods only to those who had previously ordered them in pursuance of those orders. It is doubtful whether even an act of the legislature restraining such a business could be sustained as a proper exercise of the police power. (See *People v. Jarvis*, 19 App. Div. 466; *People ex rel. Tyroler v. Warden, etc.*, 157 N. Y. 116.) It was found by the trial court that the price was made for the goods at the time of delivery and that the sale was not consummated till then. This is immaterial. The defendant did not offer his goods for sale to other persons. If he had assumed to do so that might have constituted hawking or peddling. This action, however, is not brought on any claim that the defendant has violated a police regulation for the maintenance of order or for the prevention of nuisances or objectionable callings, but, as already stated, on the theory that his business has interfered with the pecuniary value of the plaintiff's exclusive rights.

Though the plaintiff gained no exclusive privilege from the statute, if it had continued the owner and possessor of the lands in the park, it would have had, by virtue of such ownership and possession, an unqualified right to regulate business carried on there in such manner as it might deem proper, and to exclude any person from the premises for any reason. By these means the plaintiff could hold a practical

monopoly of all business carried on in the park, a monopoly subject to no legal condemnation because it would proceed from no act of the legislature or municipal regulation, but from the ownership of the land. When the plaintiff leased or granted the cottage plots it might have subjected the leases to such conditions and the tenants to such covenants as it saw fit to impose. If it had been provided in the leases that the tenant or occupant should purchase all his supplies from the plaintiff, or from such shop or market as it might establish, and should obtain no supplies from any other source, I am not prepared to say that such a covenant would not be enforced, or rather that damages could not be recovered for its violation. The exclusive privilege reserved by the landlord would fairly be a part of the consideration for the demise of the premises. But to impose such a restriction on the tenant, some condition or covenant to that effect must be found in the lease. Otherwise the dominion of the tenant is as absolute during the demised term as that of the owner previous to the demise. In the leases granted by the plaintiff, certain regulations adopted by it were expressly recited. None of these restricted the right of the tenant to purchase stores and merchandise for consumption in the park where and from whom he pleased. The lease contained the further condition that the tenant should keep and perform all such conditions or rules and regulations as the landlord should from time to time impose. Thus there was reserved to the landlord the power to subsequently make new regulations. Such power, however, though general in form, is not absolute or unqualified. A new regulation established under this reservation, to be valid, must be reasonable. In this respect the case is entirely analogous to that of a member of a corporation where power is reserved to the corporation either by the statute or by its constitution to modify or repeal by-laws and to enact new ones. "If, then, the power is reserved to alter, amend or repeal, and that reservation enters into a contract, the power reserved is to pass reasonable by-laws, agreeable to law. But a by-law that will disturb a

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

vested right is not such." (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. See, also, *Parish v. N. Y. Produce Exchange*, 169 N. Y. 34.) The question, therefore, is whether the regulation forbidding the tenants or occupants to purchase supplies except at the plaintiff's store, unless they bring those supplies personally upon the grounds, is reasonable. In determining whether the by-law of a corporation is reasonable or not, there should properly be considered the nature of the corporation and the object for which it is organized. In the present case it was intended to maintain plaintiff's park as a camp meeting ground. Its purpose was not only to provide a place for recreation, but also for the spiritual and religious edification of its members. It is well known that some religious denominations entertain views as to the propriety of conduct and demeanor of members, their recreations and their modes of life that seem strict and possibly intolerant to the rest of the community. When a person joins such an association he must expect to conform to its standards. So here, any one leasing grounds from the plaintiff, with the reservation in his lease of the right of the plaintiff to establish new regulations, might naturally expect the possibility of new regulations regarding the enjoyment of his property so as to prevent giving scandal or offense to the other tenants. Regulations of this nature which would be condemned as unwarrantable invasions of private liberty in the case of ordinary companies organized for the improvement, development and sale of tracts of land would, in the case of an association like the plaintiff, be properly upheld. The regulation which the plaintiff has sought to import into its leases is not of this character, but solely for the purpose of pecuniary gain. No regulation of the kind nor on the subject existed at the time the grounds were leased, and there was no reason why a person renting the lands should expect such a regulation to be enacted by the plaintiff any more than if he had rented the premises from an ordinary land company. The regulation seems to me of a most arbitrary and unreasonable character. Not only are the cottagers entitled to purchase where they

can buy the cheapest, but in articles of food there is great difference of individual taste. In the grocery shop established by the plaintiff there are certain brands of flour or coffee, and it may be that if the question is to be decided by the courts those brands would be held to be the best; nevertheless some of the cottagers might like other brands better. Some might prefer their vegetables fresh from the defendant's farm to those that had stood on the huckster's stand in the market. The articles kept in the plaintiff's stores and shops may be good and the prices charged therefor reasonable, but the pecuniary means of some of the cottagers may be such as to require them to purchase inferior articles at a lower price. Thus the regulation, if upheld, would seem to establish a uniform standard of taste and a uniform style of living.

The question involved in *Round Lake Association v. Kellogg* (141 N. Y. 348) and *Chautauqua Assembly v. Alling* (46 Hun, 582) is essentially different from that before us. In the *Round Lake* case the action was brought to restrain the defendant, who had acquired a lease of a plot of land, from using the premises as a place for the sale of merchandise in violation of a regulation adopted by the association forbidding such use. It was held that the regulation was reasonable, the lot not having been leased for the purposes of a shop or store, but to enable persons habitually attending camp meetings to erect cottages or tents thereon. In the *Chautauqua* case the habendum clause declared that the premises were to be held for a cottage or tent for a private residence, and the defendant attempted to maintain thereon a boarding house. Both cases involved the use of the demised land for improper or unauthorized purposes. The plaintiff has covered that subject by express provision in its leases that the premises shall not be used for any mercantile or mechanical trade, for a boarding or lodging house, or for any purpose other than a summer residence. Any violation of this covenant would be properly restrained. But limitations or restrictions on the use of property are in no way akin to restrictions or limitations on the right to purchase supplies whereon to subsist. The

fact that a restriction on one subject was imposed by the lease gave no intimation that subsequently there might be imposed restrictions on the other subject. It is said that liberty of purchase is still permitted to the tenants and cottagers if they personally bring in the goods purchased. But this is no liberty at all. The tenant ordering goods might be sick or infirm and unable to leave his residence. If it be asserted that he might authorize another to bring in the goods for him that concession would dispose of the present case, for the defendant acted in pursuance of instructions given by the tenants. If it is a violation of the plaintiff's rights for the defendant to furnish vegetables to the cottagers on orders from them, it would equally violate those rights for a grocer in Syracuse or Utica to deliver to a cottager a barrel of sugar or a barrel of flour. No such restriction is reasonable.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, MARTIN and WERNER, JJ., concur; VANN, J., not voting.

Judgment reversed, etc.

CITIZENS' SAVINGS BANK, Appellant, v. TOWN OF GREENBURGH, Respondent.

1. MUNICIPAL BONDS — VALIDITY OF, IN THE HANDS OF *BONA FIDE* HOLDERS AFFECTED ONLY BY FUNDAMENTAL DEFECT IN CREATION. Negotiable municipal bonds in the hands of *bona fide* holders are unassailable upon any ground that does not relate to the authority for their issue. If there is any element of fraud or irregularity in the conduct of the officers, or of the agents, through whom the bonds pass into the channels of business, it is not chargeable to an innocent purchaser.

2. TOWN HIGHWAY BONDS — SALE OF, AT THEIR FACE VALUE, EXCLUSIVE OF INTEREST, IN VIOLATION OF STATUTE, DOES NOT AFFECT THEIR VALIDITY IN THE HANDS OF INNOCENT PURCHASERS. Town bonds issued under chapter 493 of the Laws of 1892, providing for the construction of highways running through two or more towns of the same county, "executed by the supervisor and town clerk" thereof and delivered to the said commissioners to be paid out by them, at not less than par, in liquidation of the said damages, etc., or, at their option, "to be sold at not less than par and the proceeds thereof applied as aforesaid" (§ 6), become complete

obligations when executed. Their delivery to the commissioners has no relation to their creation. Their sale "flat," that is, without taking into account the interest which had accrued upon them, by such commissioners, which, if not fraudulent, was a deviation from the authority they possessed, constitutes an irregular exercise of the power to dispose of the bonds but does not affect their validity in the hands of innocent holders for value.

3. CONSTITUTIONAL LAW — L. 1892, CH. 493 — DUTIES IMPOSED UPON SUPREME COURT JUDICIAL, NOT ADMINISTRATIVE. Chapter 493 of the Laws of 1892, relating to the construction of highways running through two or more towns of the same county, section 1 of which provides that upon presentation of the petition to the Supreme Court at Special Term or to the County Court of the county, "the said court shall carefully consider the facts therein alleged, and if it shall be satisfied that the said highway is necessary for the public welfare and convenience and that its continuation and construction will afford a nearer route between two populous points in two towns, than by any existing highway, then the said court may make an order directing that a notice shall be published * * * of the time and place when an application for commissioners shall be made, and at said time and place said court may make an order appointing the commissioners," etc., is not unconstitutional in that it confers non-judicial power upon the Supreme Court of the state and that the procedure is non-judicial, for the lack of a judicial hearing or of a judicial form, inasmuch as it is for the court, first, to carefully consider the facts alleged in the petition. Then, if the court shall be satisfied as to the public necessity for the highway, it *may* order a notice to be published of the time and place for the making of an application for commissioners for the purpose, and, upon the return day, it *may* appoint them. An opportunity is afforded by the notice for parties to be heard, who are interested in the matter, and the court is not compelled, after hearing the parties upon the application, to proceed with the matter, if its *ex parte* consideration of the facts in the petition is differently affected, as the result of a hearing on notice.

Citizens' Sav. Bank v. Town of Greenburgh, 60 App. Div. 225, reversed.

(Argued November 25, 1902; decided January 13, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 7, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

William B. Hornblower, John F. Dillon, Harry Hubbard, John A. Beall and John W. Pirsson for appellant. The bonds sued on in this action are negotiable instruments according to the law merchant. (*Illinois v. Delafield*, 8 Paige, 527; *Bank of Rome v. Vil. of Rome*, 19 N. Y. 20; *Brainerd v. N. Y. & H. R. R. Co.*, 25 N. Y. 496; *C. Nat. Bank v. Faurot*, 149 N. Y. 532; Story on Prom. Notes, § 44; Daniel on Neg. Inst. §§ 99-104; Chitty on Bills [12th Am. ed.], 159; *White v. V. & M. R. R. Co.*, 21 How. [U. S.] 575; *M. S. Inst. v. N. Y. N. E. Bank*, 170 N. Y. 58; *B. L. T. & D. Co. v. M. G. Co.*, 162 N. Y. 67; *Cromwell v. County of Sac*, 96 U. S. 51.) Plaintiff is the *bona fide* holder of the bonds in question. (*Lexington v. Butler*, 14 Wall. 282; *Montclair v. Ramsdell*, 107 U. S. 147; *Vallett v. Parker*, 6 Wend. 615.) The bonds in suit having been executed and delivered, the fact that the road commissioners may have received something less than par in payment for the bonds in question, or that they received for the \$149,000 of bonds only \$69,000 in cash and securities of the par value of about \$100,000, for the balance due on the contract of sale to Coffin & Stanton, is no defense as against the plaintiff, the Citizens' Savings Bank, a *bona fide* purchaser of said fifty-one bonds. (Daniel on Neg. Inst. [3d ed.] § 1; *Illinois v. Delafield*, 8 Paige, 527; *Bank of Rome v. Vil. of Rome*, 19 N. Y. 20; *Cagwin v. Town of Hancock*, 84 N. Y. 532; *Brainerd v. N. Y. & H. R. R. Co.*, 25 N. Y. 496; *C. Nat. Bank v. Faurot*, 149 N. Y. 532; *P. T. Co. v. Mercer Co.*, 170 U. S. 593; *Burson v. Huntington*, 21 Mich. 415; *Waite v. Santa Cruz*, 184 U. S. 302; *Whelen v. City of Pittsburg*, 108 Penn. St. 162; *Williamsport v. Commissioners*, 84 Penn. St. 487; *Sherlock v. Winnetka*, 68 Ill. 530; *Achison v. Butcher*, 3 Kans. 104; *Griffith v. Borden*, 53 Iowa, 133.) The act under which the bonds were issued is not in contravention of any provision of the Constitution of the state of New York. (*Treanor v. Eichorn*, 74 Hun, 58; *People ex rel. v. Flagg*, 46 N. Y. 401; *Lawton v. Comrs. of Highways*, 2 Caines, 179; *People v. Champion*, 16 Johns. 61; 1 R. S. [1st ed.] ch. 16, art. 4,

§§ 83-92; *Commissioners of Highways v. Judges of Orange Co.*, 13 Wend. 433; *People v. Judges of Dutchess Co.*, 23 Wend. 360; L. 1890, ch. 568, art. 4; *Matter of De Camp*, 151 N. Y. 557; Code Civ. Pro. §§ 3357, 3384; *Railroad Co. v. Robinson*, 133 N. Y. 242; *Matter of R. T. Comrs.*, 22 App. Div. 472; *People v. Smith*, 21 N. Y. 595, *Matter of U. E. R. L. Co.*, 112 N. Y. 61; *People v. B. & O. R. R. Co.*, 117 N. Y. 150.) The investment in the bonds of the town of Greenburgh, so far from being a prohibited transaction, was authorized by express provision of statute. (L. 1892, ch. 689, § 116; *A. S. Bank v. Savery*, 82 N. Y. 291; *R. S. Bank v. Krug*, 102 N. Y. 331; *A. S. Bank v. Brinkerhoff*, 44 Hun, 142; *U. G. M. Co. v. R. M. Nat. Bank*, 96 U. S. 640.)

J. Rider Cady and *Frank V. Millard* for respondent. The act of the commissioners in delivering the bonds to the purchasing brokers was void and illegal. It was not void simply as *ultra vires*, but as a forbidden act. The plaintiff was obliged, at its peril, to inquire into the authority of the commissioners to make the contract, and was bound to notice the limitation of their powers. (*Vil. of Fort Edward v. Fish*, 156 N. Y. 363; *Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, 79 N. Y. 449; *N. Y. S. L. & T. Co. v. Helmer*, 77 N. Y. 64; *The Pioneer*, 1 Deady, 72; *Siter v. Sheets*, 7 Ind. 132; *Barton v. P. J., etc., Co.*, 17 Barb. 397; *Mitchell v. Smith*, 1 Binn. 110; *Seidenbender v. Charles*, 4 S. & R. 151; *Fowler v. Scully*, 72 Penn. St. 456.) Defendant is not concluded by the recital contained in the bonds in suit. (*M. Co. v. City of Ironwood*, 20 C. C. App. 646; *Northern Bank v. Trustees*, 110 U. S. 608; *McClure v. Oxford*, 94 U. S. 429; *Anthony v. Jasper Co.*, 101 U. S. 693; *Lake Co. v. Graham*, 130 U. S. 674; *G. S. Bank v. Franklin Co.*, 128 U. S. 526; *Dixon Co. v. Field*, 111 U. S. 83; *N. Bank of the Republic v. City of St. Joseph*, 31 Fed. Rep. 216; *P. S. Bank v. Vil. of Ashley*, 91 Mich. 670.) Chapter 493 of the Laws of 1892 is unconstitutional, and the legislature did

N. Y. Rep.] Opinion of the Court, per GRAY, J.

not possess power to enact it, because it undertakes to confer non-judicial power upon the Supreme Court of the state, to impose upon that tribunal functions that are purely administrative, and also to require the court to exercise those functions by procedure that is non-judicial in its nature. The bonds issued under it are, therefore, void. (*People ex rel. v. Waters*, 4 Misc. Rep. 1; 114 Mass. 247; 2 Dillon on Mun. Corp. [4th ed.] 703; *People v. Smith*, 21 N. Y. 598; *B. P. Comrs. v. Armstrong*, 45 N. Y. 234; *Matter of Steamboat Josephine*, 39 N. Y. 19; *Brookman v. Hamil*, 43 N. Y. 554; *Vose v. Cockcroft*, 44 N. Y. 415; *Poole v. Ker-mitt*, 59 N. Y. 554; *Burgoyne v. Suprs.*, 5 Cal. 9; *Chard v. Harrison*, 7 Cal. 113; *Power v. Vil. of Athens*, 99 N. Y. 593.)

GRAY, J. The plaintiff, a savings institution incorporated under the laws of this state, sues the defendant for the interest due upon certain bonds issued by it. The defense, in substance, is that the bonds were invalid, for having been issued in violation of the provisions of the act which authorized their issue, and that the act itself is, in a certain respect, unconstitutional. The act is contained in chapter 493 of the Laws of 1892. It is entitled: "An Act to provide for the construction of highways and bridges upon highways running through two or more towns of the same county." Its first section provides that "Any twelve or more freeholders, residing in any county of this state, may present a petition which must be duly verified by at least one of the said freeholders, to the supreme court at a special term to be held in the judicial district where such county is situated, or to the county court of said county, stating that it is necessary for the public welfare and convenience that a highway in any one town in said county shall be continued along and through another town in the same county. Upon receipt of the said petition, the said court shall carefully consider the facts therein alleged, and if it shall be satisfied that the said highway is necessary for the public welfare and convenience, and that its continua-

tion and construction will afford a nearer route between two populous points in two towns, than by any existing highway, then the said court may make an order directing that a notice shall be published in two newspapers of said county for two successive weeks, of the time and place when an application for commissioners shall be made, and at said time and place said court may make an order appointing three commissioners for the purposes hereinafter described, all of which commissioners shall be freeholders residing within the said county." Other sections prescribe the functions, duties and powers of the commissioners, who may have been appointed, and the 6th section provides that "The said commissioners shall ascertain and determine the cost, charges and expense of laying out and opening, constructing and grading the said road and the amount of damages awarded to owners or occupants of property through which the same shall have been laid out for the lands taken, and the amount as so ascertained shall be paid by the town through which said road was continued and constructed and said lands taken. The bonds or obligations of each of said towns for the proportion of such damages, costs, charges or expense so charged to them shall be issued by each of said towns in such sums as are deemed advisable by the respective supervisors thereof, and shall be payable in twenty years from the date thereof. Such bonds shall bear interest at the rate of four per centum per annum and the bonds of each town shall be executed by the supervisors and town clerk thereof and delivered to the said commissioners to be paid out by them at not less than par in liquidation of the said damages, costs, charges and expenses of laying out, opening and constructing the said road or, at their option, to be sold at not less than par and the proceeds thereof applied as aforesaid." Pursuant to the provisions of the act, a petition was presented to the Supreme Court for the appointment of commissioners, for the purpose of constructing a road through the town of Greenburgh, which should, in effect, extend, or continue, Warburton avenue, in the city and town of Yonkers, through a portion of the town of Greenburgh, to the village of Hast-

ings ; both towns being in Westchester county. Such proceedings were, thereupon, had under the act that commissioners were appointed ; who performed the duties devolving upon them and to whom were, eventually, delivered bonds of the defendant, the town of Greenburgh, amounting in the aggregate to the sum of \$149,000 of principal, duly made and executed as required by the act. It is not claimed that they were invalid upon any ground to be found in the proceedings relating to their execution and issue, up to the time when the commissioners, to whom they had been delivered, undertook to dispose of them. Under the act, they might pay these bonds out "at not less than par," in liquidation of the damages and costs incurred in constructing the proposed road, or, "at their option," they might sell them "at not less than par" and apply the proceeds for such purposes. What they did was to dispose of them to the brokerage firm of Coffin & Stanton under a contract, whereby the latter obtained them at their face value, or, in technical parlance, "flat ;" that is, without taking into account the interest which had accrued upon them, to the extent of about \$700. Coffin & Stanton used the bonds as collateral security in transactions of loans of money made to them by this plaintiff, until they failed ; at which moment the plaintiff held \$51,000, in amount, of the bonds, now involved in this action. There is no question but that the plaintiff's title as pledgee, eventually, became that of an owner, with every right of ownership, and it is not claimed that it had any knowledge of the terms upon which the bonds had been disposed of by the commissioners. The argument is, so far as it concerns the validity of the issue of these bonds, that the commissioners' act, in disposing of them to Coffin & Stanton at less than par, or at less than what was actually due upon them, was illegal and, therefore, void ; that the plaintiff was obliged, at its peril, to inquire into the authority of the commissioners to sell them to the purchasers as they did and that, as the bonds never had a legal inception as obligations of the defendant, their payment is unenforceable by the plaintiff, or by any other holder. The

question becomes one, therefore, which requires us to determine whether the feature of invalidity insisted upon by defendant, and thus far decided by the courts below to exist, was jurisdictional, or fundamental, and, therefore, affected the authority to issue the bonds, or their factum as obligations; or whether it was an irregular exercise by the commissioners of their power to dispose of the bonds for the defendant. That is to say, is the difficulty in some irregular execution of that power; or is it in the creation of the power itself? If the former, then, within the authorities, the irregularity is an unavailing objection to the demand of a holder, who, like the plaintiff, has purchased the bonds in good faith and for value; while, if the latter, the defect is incurable and the issue of the bonds lacks the necessary foundation to make them valid obligations of the defendant.

These bonds were, in their nature, negotiable instruments and were so intended by their maker. They were intended to pass from hand to hand, and, like all municipal bonds made in such form, to be valid obligations in the hands of any holder. This the defendant does not dispute; except that it is said, in its behalf, and very properly, that their character of negotiability does not prevent the defense of any invalidity which, under the law authorizing their creation, was of a jurisdictional, or fundamental, nature. Possessing the character of negotiable instruments, they should be unassailable in the hands of an innocent holder for value, upon any ground relating to the consideration received by the obligor; unless something in the law of their creation compels us to hold otherwise. Of course, between the immediate parties to the transaction, by which they were given currency, it would be otherwise.

The respondent's argument that there was such a jurisdictional defect rests, in part, upon a construction of the act and, in part, upon the tenor of certain decisions of this court.

When we consider the authorities upon the question, we find a class of cases, of which *Cagwin v. Town of Hancock*, (84 N. Y. 532), is typical, where to the validity of the bonds

a fundamental condition was wanting, in the absence of the consents required by the statute to be given by the taxpayers of the town. That case arose upon a suit brought to enforce payment of the coupons on bonds, issued by the defendant in aid of a railroad, and the defense to the suit, upon the ground that a majority of the taxpayers had not consented in writing to the bonding of the town, was finally upheld in this court. That was a fact, which, under the act, (Chap. 398, Laws of 1866), was considered to be a fundamental prerequisite to the power of the railroad commissioners, who had been appointed under its provisions, to issue bonds and proof by the affidavit of a town assessor, that the requisite number of taxpayers had consented, was held to be inconclusive and to be ineffectual as a substitute for the fact. To the proposition that it ought to be conclusive in favor of the *bona fide* holders of the bonds, it was answered that there can be "no *bona fide* holder of bonds, within the meaning of the law applicable to negotiable paper, which have been issued without authority;" and as all persons are chargeable with knowledge of the statute, "they must see to it that the statute has been complied with before they can, with absolute safety, take the bonds." In that case the fact was to be a matter of record, the existence of which inquiry would, necessarily, reveal. There is a number of cases in that class; of which *Starin v. Town of Genoa*, (23 N. Y. 439), and *Town of Venice v. Woodruff*, (62 id. 462), may be referred to. Other cases, involving the validity of issues of town bonds, denote an obvious distinction, which must exist between jurisdictional defects, such as appeared in the *Town of Hancock's* case, and irregularities in the manner in which the commissioners had exercised their power to dispose of the bonds. In *Brownell v. Town of Greenwich*, (114 N. Y. 518), the bonds sued upon were issued in aid of a railroad, under the town bonding act; but, subsequently, they were repudiated and it was insisted that they were void, because they had been made payable in 20 years, in violation of the provision of the act that they should be payable in 30 years. It was held that the act of

the commissioners, in that respect, was an irregular performance of their duty; but that irregularities will not affect the validity of bonds in the hands of an innocent holder for value. In that case, as in *Town of Solon v. Williamsburgh Savings Bank*, (114 N. Y. 122), the commissioners appointed under the act were regarded as, in a sense, agents for the town, and, within the scope of their authority, their acts were the acts of the town. In the *Town of Solon* case, the distinction was clearly pointed out between a case of the mere irregular execution by the commissioners of their power and a case where there has been a failure to comply with the statutory steps, prescribed to be taken in order to vest the power to create a town liability, as in the *Town of Hancock's* case. In the early case in this court of *Bank of Rome v. Village of Rome*, (19 N. Y. 20), the distinction between a failure to comply with jurisdictional requirements in the creation of municipal bonds, and the failure by the commissioners to comply with requirements prescribed as to their sale, in the effect upon the rights of *bona fide* holders, is exemplified in a marked manner. In that case, a subscription by the village to the stock of a railroad company had been duly approved by the taxpayers and the village issued its bonds to raise money to pay its stock subscription. The act provided, however, that the commissioners should have no power to negotiate or sell the bonds, "except upon the express condition that \$500,000, shall have been first subscribed to the capital stock of the railroad company," by other parties, and that the commissioners should make and record a certificate to that effect and that such subscription had been made, in good faith and by persons of sufficient ability. The commissioners' certificate was held to be conclusive evidence, as between the defendant and *bona fide* holders of the bonds, and their abuse, or excess, of power, would not affect the rights of the latter. As it was observed of that case in *Town of Hancock's* case, "there was nothing more for the village or its taxpayers to do. Whatever else remained was committed to the railroad commissioners, named in the act, as agents of the village."

The case of *Village of Fort Edward v. Fish*, (156 N. Y. 363), relied upon by the respondent, is in no sense controlling. The question was one between the village and the defendant upon a contract for the sale of its bonds. It was an executory contract, by which the defendant was to become the purchaser of the bonds at their face value, without taking into account the accrued interest, and, as the act prohibited their sale at less than the par value thereof, we held the contract to have been void, not binding upon the village and wholly unenforceable. The purchaser was, of course, chargeable with the knowledge that the act forbade his purchase at less than par and he acquired no rights against the village under the illegal contract. We find, therefore, that the validity of municipal obligations is not affected, in the hands of innocent holders for value, by facts, which concern merely the manner of their passing from their maker into currency and which do not concern the mode of, or the authority for, their creation. *The State of Illinois v. Delafield*, (8 Paige, 527), shows that a principle, so obviously right, was very early recognized in this state. The state of Illinois sought to enjoin the defendant from selling, or disposing, of state bonds, purchased from the state's agents at less than par in violation of an express provision of the law, which authorized their creation. The chancellor granted the preventive relief demanded, upon the ground that, in the hands of *bona fide* holders, the bonds would be obligatory upon the state. His decision was affirmed in the Court of Errors, upon similar grounds; "the bonds being," it was said, "negotiable instruments, * * * although void in the hands of the appellant, (Delafield), they will be valid securities in the hands of a *bona fide* holder." (2 Hill, 159.)

Without further reviewing cases, which have so often before been discussed, I think it must be conceded that these bonds were invested with a character of negotiability, which, in the hands of *bona fide* holders, rendered them unassailable upon any ground that did not relate to the authority for their issue, and that, if there was any element of fraud, or irregularity,

in the conduct of the officers, or of the agents, through whom the bonds passed into the channels of business, it is not chargeable to an innocent purchaser. To hold otherwise would be to affect their value as investment securities, by depriving them of the marketable feature of negotiability. If they do not import a consideration duly received by the municipality, when in the hands of an early purchaser, the duty of inquiry might continue for years. And it is to be observed that a duty of inquiry, or of investigation, into the regularity of their sale by, or for, the municipality, under statutory provisions, could be but imperfectly, or unsatisfactorily, performed, if at all, for want of conclusiveness, or of an adequate record. The statute requires no public record of the payment out, or sale, of the bonds. The requirement of such a duty would be to impose an unnecessary burden, as well, upon municipal officers. Nor does a reasonable construction of the act afford support to the contention of the defendant, that these bonds were invalid issues. The act provided that the bonds, to be issued by the town, "shall be executed by the supervisor and town clerk thereof and delivered to the said commissioners to be paid out by them, at not less than par, in liquidation of the said damages, etc., or, at their option, to be sold at not less than par and the proceeds thereof applied as aforesaid." I think it to be quite clear, from this language, that the bonds of the town, upon the occasion arising, being executed by the officers thereof named in the act, were complete as obligations and their delivery to the commissioners had no relation to their creation. That delivery was something required by the act, in order that the commissioners might pay out, or realize upon, the bonds. The town could do no more, with reference to the creation of the bonds. It could deliver them to the commissioners, who would receive them as an agency created by law for a specified purpose. They were the agents of the town, for the purpose of discharging the cost of the work and the claims arising upon the construction of the highway, through the application, or sale, of the bonds, and were responsible to it

for the faithful and proper performance of their duty in that respect. They, merely, held bonds, which the town had issued, until they could be used in paying the indebtedness of the town, and if they disposed of them contrary to the statutory provision as to price, it is obvious that that was a matter, if not of fraud, of a deviation from the authority they possessed; which, for not affecting the factum of the bond, cannot, and should not, be chargeable to the innocent purchaser. Having inquired into the authority for creating the bonds, and into the proceedings taken under the act, how is an intending buyer to be satisfied as to the correctness of the commissioners' disposition of the bonds, with any certainty, or conclusiveness? They may have been faithful, or unfaithful; careless, or mistaken, in their dealing with the bonds; but, after the commissioners had once disposed of them, except as to the immediate purchaser from them, they carried with them to parties, acquiring them in the usual course of business, before maturity, the right to enforce them to the extent that they purported to obligate the defendant. It was observed below, with some emphasis, that "if bonds issued in violation of law can become enforceable because bought without notice, then all constitutional and statutory restrictions are nugatory." A similar observation might have been made with respect to the correctness of the decision in the case of *Bank of Rome v. Village of Rome*, (*supra*), or in that of *Brownell v. The Town of Greenwich*, (*supra*). But, in such an assertion, sight is lost of the established and far-reaching principle of negotiability, which gives a currency value to such bonds and transfers a title to the *bona fide* purchaser, clear of any defense based upon inadequacy, or failure, of consideration. The assertion fails to discriminate between the situation, or the completeness, of bonds, which have been made, or issued, by the town and, thereupon, delivered to agents, or officers, for application to specified purposes, and the situation subsequently arising, when the latter deviate from the terms of their authority in disposing of them. Finally, it is overlooked that an intending purchaser is without the means, as

through some public record, of ascertaining, with conclusiveness, the price paid by the first taker, or the consideration actually received.

For these reasons, I am unable to agree with the contention of the respondent, that the disregard by the commissioners, who were charged with the custody and negotiation of the bonds in question, of the terms of their authority with respect to the price to be obtained upon their sale affected their validity.

The only question raised as to the constitutionality of the act, under which the bonds were issued, is that the legislature has undertaken to confer non-judicial power upon the Supreme Court of the state and to impose upon that tribunal functions that are purely administrative. In other words, the objection is that the legislature has converted the court "into a commissioner, or commission." By this general law for the construction of highways, in the cases mentioned, while the duty devolved is, in a certain limited sense, administrative, it, nevertheless, imposed judicial functions. The legislature is unrestricted in its power to provide for the construction of public highways, and, from an early day in this state, there has been legislation devolving functions similar in effect to those imposed in this act, which has never been held to be objectionable by this court. To confer upon the court the power to determine as to the necessity for a highway or, under certain conditions, to lay it out, has been usual in this state. It is immaterial, of course, to the point whether it is exercised, in the first instance, upon the application; or upon an appeal from a determination of the commissioners appointed by the court. It was observed in *Commissioners of Highways of Warwick v. Judges of Orange County*, (13 Wend. 433), by Mr. Justice NELSON, that "the proceeding by appeal was not intended to be a review of legal questions, or of irregularities that might exist in the preliminary steps, as on a writ of certiorari; but to be an examination of the necessity or propriety of the road, assuming all the previous steps to have been regularly taken." In that case, three of the judges of the county of Orange laid out a road, in the town of Warwick, upon an

N. Y. Rep.] Opinion of the Court, per GRAY, J.

appeal from a decision of the commissioners refusing to do so, and the proceedings of the judges were affirmed. (And see *People ex rel. Shaut v. Champion*, 16 Johns. 61.)

The present General Highway Law, (Chap. 568, Laws of 1890, secs. 83, 89), confers upon the County Court the power to review a decision of the commissioners as to the necessity for a highway and to confirm, vacate, or modify, their decision in this respect. In *Matter of De Camp*, (151 N. Y. 557), it was held that the decision of the court "determines, finally, the question of the necessity for the proposed highway."

The Condemnation Law, contained in the Code of Civil Procedure, (§§ 3357 to 3384), provides that the court is to try any issue, made upon proceedings for the condemnation of property, or it may refer the same, and, if the petitioner prevails, a judgment shall be entered adjudging that the condemnation of the property described is necessary for the public use.

The General Railroad Act of 1850, (Chap. 140), provided that the necessity for the taking of land for the purposes of a railroad should be determined by the Supreme Court, and in *Matter of New York Central R. R. Co.*, (66 N. Y. 407), it was said by Judge RAPALLO, in the opinion, that "in the case of *Rensselaer & Saratoga Railroad Company v. Davis*, (43 N. Y. 137), this court decided that, by the General Railroad Law, the legislature had not delegated to railroad corporations the power of determining what lands were necessary to be appropriated to their use for the purposes of the incorporation, but that, under that statute, it was for the court to determine, upon the application by a railroad company to acquire lands, the question of the necessity and extent of the appropriation, and that the landowner might contest this question. This necessity is, therefore, made a judicial question and, when controverted, it is obvious that the facts must, in some form, be laid before the court to enable it to decide."

That the court acts judicially in performing the functions imposed by this act is apparent from a careful consideration of its language. The act provides, (Sec. 1), that upon presentation of the petition to the Supreme Court, at Special

Term, or to the County Court of the county, "the said court shall carefully consider the facts therein alleged, and if it shall be satisfied that the said highway is necessary for the public welfare and convenience and that its continuation and construction will afford a nearer route between two populous points in two towns, than by any existing highway, then the said court may make an order directing that a notice shall be published * * * of the time and place when an application for commissioners shall be made, and at said time and place said court may make an order appointing the commissioners," etc. Thus, it is for the court, first, to carefully consider the facts alleged in the petition. Then, if the court shall be satisfied as to the public necessity for the highway, it *may* order a notice to be published of the time and place for the making of an application for commissioners for the purpose and, upon the return day, it *may* appoint them. Clearly an opportunity is afforded by the notice for parties to be heard, who are interested in the matter, and quite as clearly is the court not compelled, after hearing the parties upon the application, to proceed with the matter, if its *ex parte* consideration of the facts in the petition is differently affected, as the result of a hearing on notice.

The notice by publication was appropriate to the nature of the case, and was reasonable. The very object of the adjournment and of the publication was to inform all parties interested and to permit them to come in and to be heard upon any objections to the proceeding. It was not essential to the constitutionality of the act that the parties interested in the construction of the new highway should have notice of the presentation of the petition, if they had an opportunity to be heard before the court acted in appointing commissioners. Knowledge of the act was chargeable to all parties, the town and the landowners, and the notice by publication sufficiently apprised all of the stated hearing upon the matter. (See *Matter of Village of Middletown*, 82 N. Y. 196, 201; *Lent v. Tillson*, 140 U. S. 316, 328, and *Spencer v. Merchant*, 125 ib. 345.) The town, if it had any right to notice at all (see

N. Y. Rep.] Dissenting opinion, per PARKER, Ch. J.

People ex rel. McLean v. Flagg, 46 N. Y. 401), had all the notice and opportunity to be heard that was necessary.

All that the court does, preliminarily, and all that it does, in the end, is to pass upon the question of the necessity of the highway. The laying out and the construction of the road are duties of the commissioners, whom the court may decide to appoint. The powers were conferred by the act upon the court, as a court, and not upon the justices in a distinct capacity, or office. (*Striker v. Kelly*, 7 Hill, 9.) Therefore it is that I am of the opinion, regarding the question in the light of the legislative expressions and of the decisions, that the act is not to be condemned as violative of the Constitution upon the grounds urged, that the court exercises a non-judicial power and that the procedure is non-judicial, for the lack of a judicial hearing, or of a judicial form.

I advise the reversal of the judgment appealed from and that a new trial be ordered, with costs to abide the event.

PARKER, Ch. J. (dissenting). The statute which lies at the foundation of these bonds does not, I think, confer judicial functions upon the court which it purports to empower to take such action as will result in the building of a highway at great expense to a town, without notice to any officer of the town, and, therefore, without granting the town the right to be heard. A more arbitrary, undemocratic use of the funds and credit of a town cannot be conceived of, and it would seem to be unfitting that a court should be made the instrument of working out such a scheme. My objection to the statute, however, rests on the broader ground that it offends against the Constitution of the state in that it attempts to confer upon the judiciary functions not judicial but administrative.

Our government consists of three departments, each with distinct and independent powers, designed to act as a check upon those of the other two co-ordinate branches. The legislative department makes the laws, while the executive executes, and the judicial construes and applies them. Each is confined to its own functions and can neither encroach upon

nor be made subordinate to those of another without violating the fundamental principle of a republican form of government. (*Matter of Davies*, 168 N. Y. 89.)

Ever since Chief Justice MARSHALL wrote his famous opinion in *Marbury v. Madison* the responsibility has been assumed and the duty exercised by the courts of determining when statutes offend against the Constitution, and they have without hesitation declared null and void all such enactments. This power, as at all other times, should be strictly exercised when authority forbidden by the Constitution is conferred upon the courts instead of upon the executive or other administrative officers of the state or upon artificial persons created by it. Such resistance should not be made because the court would be relieved of the work or regards it as beneath its dignity to exercise administrative functions, but on the higher ground that the scheme of the Constitution to confine the court to the exercise of judicial functions should be strictly heeded, not only because the Constitution would have it so, but because it is founded in wisdom, as every experienced judge knows.

The readiness with which the suggestion is accepted from time to time, that the judiciary exercise important administrative functions is due to the confidence generally reposed in the judiciary, which in turn is due in no small measure to the fact that it is prohibited from exercising political functions involving the distribution of patronage which quite frequently results in the overriding of the minority in a way that impresses the people as being arbitrary and unjust. In many instances in this state have statutes conferred upon the judiciary administrative functions. In some the statutes have been executed by the courts without protest. In others such statutory schemes have been resisted at the outset. (*People ex rel. Decker v. Waters*, 4 Misc. Rep. 1.) That course should have been taken in this case by the Special Term to which the application was made which resulted in the building of a highway, and the issue of the bonds involved in this litigation.

The petition in the matter of that application called the

N. Y. Rep.] Dissenting opinion, per PARKER, Ch. J.

attention of the court to a statute which authorizes a Special Term of the Supreme Court held in any county in the judicial district — even the remotest one from the county in which the *locus in quo* might be situated — upon the petition of “any twelve or more freeholders residing in any county of this state” — not necessarily in the town to be affected — which petition “must be duly verified by at least one of said freeholders * * * stating that it is necessary for the public welfare and convenience that a highway in any one town in said county shall be continued along and through another town in the same county,” and further, that “upon receipt of said petition the said court shall carefully consider the facts *therein alleged*, and if it shall be satisfied that the said highway is necessary for the public welfare and convenience * * * then the said court may make an order directing that a notice shall be published in two newspapers of said county for two successive weeks of the time and place when an application for commissioners shall be made, and at said time and place said court may make an order appointing three commissioners for the purposes hereinafter described, all of which commissioners shall be freeholders residing within the said county.” The following sections give to the commissioners power to proceed at once to lay out, open and construct the highway with full authority to ascertain and determine the costs, charges and expenses, including the amount of damages awarded to owners or occupants, and commands that such amount shall be paid by the town through which the road is constructed, and authorizes it to issue bonds or obligations to meet the same.

It will be seen, therefore, that upon the petition of twelve freeholders, verified by one of them, the court without notice to or appearance of any official or inhabitant of the town is permitted to decide, not upon a hearing, but upon “the facts alleged therein” (meaning the petition), whether a highway shall be built, and if from that statement of facts it seems to the court likely that it will be a good thing for the town or county, then it shall give notice to everybody in general, but

no one in particular, of what? That it is open to a reconsideration of the question of the propriety of the building of the road? Not at all. But instead notice that at a given time and place the court will appoint commissioners. The statute does not provide in terms that the town shall have the right to be heard even then; but if it *shall* be heard it will be only as to the names of the persons who are to execute the will of the twelve men, who may be *non-resident* freeholders of the town, as indorsed by the court at Special Term.

Argument cannot be required, I think, in support of the assertion that the action which this statute authorizes the court to take upon the presentation to it of a petition such as is described therein is not judicial, but is administrative.

The Special Term did *not*, however, take the action I have suggested should have been taken in the first instance. And now the question is pressed for decision at a time when the practical effect of a holding that the statute violates the Constitution will be to enable the town to pay for the road of which it is enjoying in part, at least, the benefit, at the expense of this savings bank, and quite naturally it impresses all who consider it as an unfortunate result.

So, in support of the validity of the statute, argument is made by counsel that during almost all of our constitutional history there have been statutes providing in some way for action by the courts in connection with the laying out of highways. But no statutes have been brought to our attention which, like the one in question, permit a Special Term, upon an *ex parte* application, to make an order that a highway be builded. And if there *were* precise precedents for it, and many of them, I should urge that, be there ever so many trespasses against the Constitution, they never ripen into a right to invade it.

As to the other questions discussed in Judge GRAY's opinion, I concur with him.

I advise an affirmance of the judgment.

O'BRIEN, MARTIN and CULLEN, JJ., concur with GRAY, J.; VANN and WERNER, JJ., concur with PARKER, Ch. J.

Judgment reversed, etc.

THE NEW YORK AND ROSENDALE CEMENT COMPANY, Appellant,
v. W. JEROME DAVIS et al., Constituting the Board of
Trustees of the Village of Rosendale et al., Respondents.

MUNICIPAL BONDS—VILLAGES—RESOLUTION TO PURCHASE WATER WORKS SYSTEM—LANGUAGE SUFFICIENT TO AUTHORIZE ISSUE OF BONDS FOR SUCH PURPOSE—VILLAGE LAW, § 128 (L. 1897, ch. 414). A resolution, duly adopted by the taxpayers of an incorporated village, that there "shall be raised upon the village" the necessary amount for the purchase of a water works system is broad enough, under section 128 of the Village Law (L. 1897, ch. 414), to authorize the issue of bonds on the credit of the municipality for that purpose. A taxpayer's action to restrain such issue of bonds cannot be maintained on the ground that the words of the resolution were insufficient to authorize it, nor on the ground that the words of the resolution, if sufficient to authorize such issue of bonds, are indefinite in that they also include the power to levy a tax, thus committing the choice of methods to the board of trustees, a power which the electors are not authorized to delegate to the board, and which it is not authorized to exercise. The statute does not authorize, or suggest even, the payment of the purchase price of water works by taxation, but does, in terms, authorize the borrowing of money to pay for them; the language of the resolution is broad enough to cover it; therefore, the trustees did what the taxpayers, by permission of the statute, authorized.

N. Y. & Rosendale Cement Co. v. Keator, 62 App. Div. 577, affirmed.

(Argued November 14, 1902; decided January 13, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 9, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

This is a taxpayer's action brought to restrain the trustees of the village of Rosendale from issuing bonds to purchase the water works plant in that village in pursuance of a contract between the village and the water company for a supply of water, which reserved an option to the village to purchase the water works at any time within five years for the sum of \$40,000.

In March, 1900, the trustees of the village submitted at the annual election the following proposition for vote: "*Resolved*, Shall there be raised upon the village of Rosendale the sum of \$40,000 for the purchase of the water works system from the Rosendale Water Works Company?"

The election officers certified that the number of votes cast on this proposition was 99, of which 52 were in favor of the proposition and 39 against it. Subsequently the board of trustees adopted a resolution to purchase the water works for \$40,000 and to issue bonds therefor. The bonds were prepared, but are still in the hands of the village treasurer unissued.

It is claimed, among other things, that the resolution was insufficient to authorize the issue of the bonds, and authorized, by its terms, only the raising of the \$40,000 by *taxation*.

Howard Chipp and *Amos Van Etten* for appellant. Municipal corporations are not empowered to borrow money unless expressly authorized to do so by statute, and if they are so authorized by statute such statutory authority must be strictly followed. (*Wells v. Town of Salina*, 119 N. Y. 280; *Parker v. Supervisors*, 107 N. Y. 410; *Mayor v. Ray*, 19 Wall. 468; L. 1897, ch. 414, § 128.) The resolution as submitted to and voted upon by the electors was no authority for the borrowing of money or the issuing of bonds. (*Wells v. Town of Salina*, 119 N. Y. 280; *People v. Smith*, 45 N. Y. 781; *People v. Hulbert*, 46 N. Y. 110; *Wellsboro v. R. R. Co.*, 76 N. Y. 185; *Sharp v. Speir*, 4 Hill, 76; *Clason v. Baldwin*, 152 N. Y. 204.) The proposition as submitted to the electors was not broad enough to cover the subsequent issue of bonds. (*Scott v. Twombly*, 20 App. Div. 535.)

John J. Linson for respondent taxpayers. The action of the trustees in submitting to the taxpayers the question of the purchase of the water works and the subsequent contract with the water works company were valid and regular. (L. 1897, ch. 447; *Hubbard v. Sadler*, 104 N. Y. 223;

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

Vil. of Carthage v. Frederick, 122 N. Y. 268; *Birge v. B. I. B. Co.*, 133 N. Y. 477.)

John G. Van Etten for Rosendale Water Works Company, respondent. The village of Rosendale having a valid option for the purchase of said water works system for \$40,000, and the proposition to complete such purchase and to raise the money therefor having been carried by a majority vote of the qualified electors voting thereon, with the intention on the part of such voters that such sum was not to be raised by taxation, but by borrowing, the board of trustees were authorized to complete such purchase and to raise such sum by the issue of village bonds. (L. 1894, ch. 230; L. 1896, ch. 258; *Town of Gallatin v. Loucks*, 21 Barb. 578; *Birge v. B. I. B. Co.*, 133 N. Y. 490; *Hubbard v. Sadler*, 104 N. Y. 224; *Vil. of Carthage v. Frederick*, 122 N. Y. 268; *Mills v. Gleason*, 11 Wis. 470; *Clark v. Jamesville*, 10 Wis. 136; *State v. Madison*, 7 Wis. 688; Dillon on Mun. Corp. [4th ed.] § 127; *Le Couteulx v. City of Buffalo*, 33 N. Y. 333; *Scott v. Twombly*, 20 App. Div. 535.) Under the facts proved, the complaint was properly dismissed. (*Talcott v. City of Buffalo*, 125 N. Y. 280; *Ziegler v. Chapin*, 126 N. Y. 342; *Morgan v. City of Binghamton*, 102 N. Y. 500.)

John E. Hardenbergh for Board of Trustees of Village of Rosendale, respondent.

PARKER, Ch. J. That a village — the total annual expenses of which were but \$5,000 and which could only muster ninety taxpaying inhabitants to vote upon the question whether the municipality should buy the water works from which it was obtaining its supply for village purposes — may have expected, from the form of that resolution, that it was voting to pay \$40,000 in the next annual tax levy does not seem to us either probable or possible. And we are quite prepared to assert that there was no such understanding on their part, since we

have read the resolution upon which they voted and which, with a notice that it was to be voted upon, had been duly posted for quite a period of time and published in the local newspapers, together with the statement by the village authorities, likewise posted and published, of the expenses for the ensuing year, as passed by the board of trustees of the village at the same meeting at which it was resolved to submit the question whether the option with the water works company should be taken advantage of. This statement contained the following items:

" Highway Fund.....	\$2,075.00
" Ordinary Fund.....	2,000.00
" Water Fund.....	925.00."
	<u> </u>

Certainly the taxpayers were not led to expect that any portion of the moneys thus to be raised was to constitute the fund for the purchase of the water works. They knew that they were voting under a statute which would permit them, in the event that a majority should vote in favor of purchasing the water works, to buy and pay for them by the proceeds of bonds covering the property of the village; and, logically and necessarily, their vote in favor of the resolution would seem to command that action on the part of the village trustees, who were authorized to act for the village under the statute.

The action taken under the statute was regular in all respects unless it be true that the form of the resolution was so far a mistake as to invalidate all action. The resolution upon which the people voted read as follows: "*Resolved*, Shall there be raised upon the village of Rosendale the sum of \$40,000 for the purchase of the water works system from the Rosendale Water Works Company?"

Now, it is said that we should hold that the vote of the people that there shall "be raised upon the village of Rosendale" did not mean that the \$40,000 should be borrowed by the issue of its bonds. The statute permitted the people to provide for the payment by borrowing upon bonds, but it is urged

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

that the people did not authorize it. This suggestion is so aptly and decisively met by Mr. Justice EDWARDS, who wrote for an unanimous court at the Appellate Division, that I quote from his opinion :

“I do not think that the word ‘raised’ is used in the Village Law in that restricted sense. To raise money, in its ordinary import, is simply to procure it. When applied to an individual or a business corporation, it means the procuring of money in any of the usual methods, by note, mortgage or other obligation. As applied to municipal corporations, its ordinary import is the procuring of money by taxation or by the obligations of the corporation. The usual method of a municipal corporation of raising money for ordinary purposes is by taxation ; for *extraordinary* purposes, by its obligations, generally in the form of bonds. Where a statute authorizes the borrowing of money, the words ‘to raise money’ are equally apt to signify raising by taxation or by municipal obligations. That this is the commonly accepted significance of the words seems to me to be beyond controversy, and this too is their legal significance, except where used in a statute in which it appears that they were intended to be used in a more restricted sense.”

Black’s Law Dictionary defines “Raising money” as follows: “To raise money is to realize money by subscription, loan or otherwise.”

The appellant, in support of its contention that the words “raised upon the village of Rosendale” do not authorize the borrowing of money upon the obligations of the village, cites *Wells v. Town of Salina* (119 N. Y. 280); but that case was subsequently distinguished and limited by the *Birge* case (133 N. Y. 477), which, as we understand it, is authority for the proposition that the language employed in the resolution is broad enough to authorize the issue of bonds with which to raise the money needed to pay for the water works, the purchase of which was authorized by the resolution after its adoption by a majority of those voting thereon.

It is further objected that the resolution, if it be sufficient

in terms to authorize the raising of the money on the obligations of the village, authorizes also the raising of the purchase price of the water works by taxation and that, therefore, the choice of methods is left to the trustees, who are given no authority in the premises by statute. Stated in other words, the objection is that the difficulty with the use in the resolution of the word "raised" is not that it is insufficient to include authority to borrow money, but that it is indefinite, in that it also includes the power to levy a tax; the town electors had power to direct the money to be raised in either way, by taxation or by the issue of bonds, but it did not have the power to commit the choice between the alternatives of taxation and debt to the board of trustees.

To this objection there are three answers :

1. The statute does not in terms authorize the payment of the purchase price of water works by taxation, nor does it suggest it even. It would be very strange if it did, for we venture to say that in all of the municipal history of this country there has never been an instance where a municipality took over the water works of a private corporation by which it was being supplied with water and paid the purchase price in the next annual tax levy. Such a thing could not have been imagined as an event likely to occur in municipal finance, and so it is not surprising that such a situation was not provided for.

2. The statute does in terms authorize the borrowing of the money to pay for them (§ 128, Village Law); the language of the resolution is broad enough to cover it; therefore, the trustees were proceeding to do what the taxpayers, by permission of the statute, authorized.

3. *Birge v. Berlin Iron Bridge Co.* (133 N. Y. 477) is decisive of the question, the same point being presented, and it should be followed. In that case the vote of a special town meeting was in favor of "raising and appropriating moneys for the construction" of a certain bridge. Bridges were at that time, and prior thereto, rarely paid for in any other way than by direct taxation. It was argued that under all these

circumstances the provisions in the resolution for "raising and appropriating" did not authorize borrowing. But this court held, Judge PECKHAM writing: "Where the power to borrow money exists by virtue of a statute specially granting it on certain conditions, we think the expression stating that the meeting is called to vote upon the question of raising and appropriating the money, is a sufficient compliance with the act of 1885, which imposes a condition that the special town meeting shall be called for the purpose of considering the question of the erection, etc., of the bridge as already stated."

The other exceptions do not require discussion.

The judgment should be affirmed, with costs.

O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and CULLEN, JJ., concur.

Judgment affirmed. _____

FARMERS' FEED COMPANY OF NEW JERSEY, Respondent, v.
SCOTTISH UNION AND NATIONAL INSURANCE COMPANY OF
EDINBURGH, Appellant.

1. INSURANCE (FIRE)—APPORTIONMENT OF LOSS—DEFINITION OF TERM "WHOLE INSURANCE." The words "whole insurance," as used in an apportionment clause of a fire insurance policy providing that the company shall not be liable for a greater proportion of any loss than the amount insured by its policy should bear to the whole insurance on the property, means the face value of the policy together with the face value of all policies issued by other insurers upon the same property, and for the purpose of apportioning a loss, all other insurance is to be included, whether made by another company alone or by a contract between it and the insured by which in case of a partial loss each stands part as a co-insurer.

2. PERCENTAGE CO-INSURANCE—FACE VALUE OF ALL POLICIES ON SAME PROPERTY CONSTITUTES THE WHOLE INSURANCE. Where the insured subsequently procures policies upon the same property in other companies, which provide for the payment to him of not exceeding a specified sum in case of a total loss, or in case the loss is partial and his insurance amounts to eighty per cent of the cash value of the property, but he agrees that if both loss and insurance are each less than eighty per cent to take less than the amount of his loss, if a loss occurs, and the loss and insurance are each less than eighty per cent, the whole amount of insurance effected by the policies is not the amount of insurance assumed by

such companies under the circumstances, but is the largest sum which under any circumstances they can be required to pay, and in such case the insured becomes a co-insurer for the difference between that amount and the face value of the policies; the fact that the whole amount of insurance upon the property is in excess of his loss does not entitle him to full indemnity since the loss and the insurance being less than eighty per cent of the cash value, by the additional policies, he agreed to stand part of it himself, and the amount of his share of the loss should be included in apportioning the loss of the prior company.

3. METHOD OF APPORTIONMENT. Where, upon the submission of a controversy, it appears that the defendant insured plaintiff's property to an amount not exceeding \$60,000, which amount was subsequently reduced to \$42,500, the policy containing the usual apportionment clause; that subsequently he procured additional insurance from other companies to an amount not exceeding \$17,500 in all; that each of the policies issued by such companies, in addition to an apportionment clause, contained a percentage co-insurance clause as follows: "In consideration of the premium for which this policy is issued it is expressly stipulated that in the event of loss this company shall be liable for no greater proportion thereof than the sum hereby insured bears to 80 per cent of the cash value of the property described herein at the time when such loss shall happen, nor more than the proportion which this policy bears to the total insurance;" that a loss occurred appraised at \$45,321.18; that at the time of the loss the cash value of the property was \$124,660 — the "whole insurance" effected by the additional policies is \$17,500, not \$7,952.84, the amount of the insurance assumed by the other companies as determined by the following proportion: As 80 per cent of the cash value, \$99,728 : \$17,500 :: \$45,321.18 : the amount required, the plaintiff becoming a co-insurer for the difference; the defendant's liability under its apportionment clause is not

$$\frac{42,500}{50,452.84 \text{ } (\$42,500 + \$7,952.84)} \times 45,321.18 = \$38,177.26$$

thus giving no effect to the amount of insurance assumed by the plaintiff as co-insurer, but is $\frac{\$42,500}{\$60,000} \times \$45,321.18 = \$32,102.50$, the balance of the loss being chargeable to the plaintiff and the other companies.

Farmers' Feed Co. v. Scottish Union & Nat. Ins. Co., 65 App. Div. 70, reversed.

(Argued December 8, 1902; decided January 13, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 20, 1901, in favor of plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

The nature of the controversy and the facts, so far as material, are stated in the opinion.

Michael H. Cardozo and *Edgar J. Nathan* for appellant. In determining the defendant's share of the loss, under the provision for its apportionment among the several insurers, the amount of the "whole insurance" must be computed without reference to the co-insurance clauses in the other policies. (*Chesborough v. H. Ins. Co.*, 61 Mich. 333.) In view of the appraisal clause of the standard policy, the proper use of the contribution clause requires the construction contended for by the defendant. (*C. Ins. Co. v. A. Ins. Co.*, 138 N. Y. 16.)

Martin Paskusz, *Henry L. Cohen* and *William S. Gordon* for respondent. The amount of insurance carried by plaintiff at the time of the loss being in excess of the appraised loss, the plaintiff is entitled to full indemnity and should by no construction of the defendant's policy be considered a co-insurer with the defendant. (*Matthews v. A. C. Ins. Co.*, 154 N. Y. 449; *Janneck v. M. L. Ins. Co.*, 162 N. Y. 574; *Kratzenstein v. W. Assur. Co.*, 116 N. Y. 59; *Allen v. St. L. Ins. Co.*, 85 N. Y. 473; *Herman v. M. Ins. Co.*, 81 N. Y. 184; *Michael v. P. Nat. Ins. Co.*, 171 N. Y. 25; *Matthews v. A. C. Ins. Co.*, 154 N. Y. 456; *A. C. & I. Co. v. Wood*, 73 Fed. Repr. 81; *May on Ins.* [4th ed.] § 435; *Sherman v. M. Ins. Co.*, 39 Wis. 104; *R. Ins. Co. v. Roedel*, 78 Penn. St. 19.)

VANN, J. This controversy was submitted upon an agreed statement of the facts, which, so far as material to the appeal, are as follows:

In May, 1898, the defendant, by a policy of the standard form, insured certain buildings belonging to the plaintiff in the city of New York against loss by fire for the term of three years from the 23rd of May, 1898, "to an amount not exceeding \$60,000." On the 14th of June, 1900, such insur-

ance to the amount of \$17,500 was canceled by mutual consent, leaving a balance of \$42,500 still in force. The policy contained an apportionment clause which provided that "this company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, * * *."

On the 5th of June, 1900, the plaintiff procured other insurance on the same property "to an amount not exceeding \$5,000" in each of the following companies: The Springfield Fire and Marine Insurance Company, The Providence Washington Insurance Company, and the Westchester Fire Insurance Company, and "to an amount not exceeding \$2,500" in the Insurance Company of the State of Pennsylvania, making \$17,500 as the maximum amount for which these four companies could in any event become liable. Each of these policies contained a paragraph headed: "Percentage Co-Insurance Clause," of which the following is a copy: "In consideration of the premium for which this policy is issued it is expressly stipulated that in the event of loss this company shall be liable for no greater proportion thereof than the sum hereby insured bears to 80 per cent. of the cash value of the property described herein at the time when such loss shall happen; nor more than the proportion which this policy bears to the total insurance."

On the first of July, 1900, a fire occurred by which the property insured, the cash value of which was \$124,660, was damaged to the amount of \$45,321.18, as ascertained by an appraisal duly had.

The plaintiff claims that the amount due from the defendant under its policy, "by reason of the fire loss," was \$38,177.26, while the defendant claims that such amount was but \$32,102.50, which it has paid to the plaintiff under an agreement that such payment should be without prejudice. The Appellate Division rendered judgment in favor of the plaintiff for the difference between these sums, amounting

N. Y. Rep.] Opinion of the Court, per VANN, J.

to \$6,074.76, with interest thereon from November 28th, 1900.

The decision of the controversy turns on the meaning of the words "whole insurance," as used in the apportionment clause of the defendant's policy. It was there provided that the defendant should not be liable for a greater proportion of any loss than the amount insured by its policy should bear to the whole insurance on the property. There is no disagreement as to the amount of insurance made by the defendant's policy which was absolute, but the controversy is over the amount made by the four other policies which were not absolute, owing to the co-insurance clause. The defendant claims that the whole insurance was \$60,000, comprising the \$42,500 made by its own policy and \$17,500, or the greatest sum for which in any event the four companies could become liable, and that the plaintiff was a co-insurer to the extent of the difference between the amount for which they are liable and the maximum amount for which they might be liable. This would reduce the indemnity furnished by the defendant's policy from \$38,177.26, the amount claimed by the plaintiff, to \$32,102.50, the amount paid by the defendant.

The plaintiff claims and the Appellate Division held that, under the circumstances, "the amount of insurance effected by the four policies is identical with the amount of the loss, and that the extent of that insurance could not be ascertained until after a loss, for the insurance was to an amount not exceeding a stipulated sum and was, therefore, indefinite." This conclusion gives no force to the apportionment clause in the defendant's policy when construed in connection with the co-insurance clause of the other policies. Moreover, all five insurance policies, including that issued by the defendant, are indefinite in the same way, for they all make insurance to an amount not exceeding a sum named which is usually regarded as the amount of insurance effected.

The four companies stipulated that they should "be liable for no greater proportion" of the loss, which was \$45,321.18, "than the sum hereby insured," or \$17,500, "bears to 80 per

p. 21

cent. of the cash value of the property," which was \$99,728. Their liability, therefore, is represented by the following proportion: As \$99,728 is to \$17,500, so is \$45,321.18 to the amount required, or \$7,952.84. Was this "the whole insurance" effected by the four policies containing the co-insurance clause? If so, that clause has no effect in this case. We think it was not, for if the loss had been greater, the amount called for by the policies would have been greater also, and yet it could not have exceeded the amount of the insurance. The largest sum which in any event can be collected under a policy, and not the smaller sum which may be collected under special circumstances, is the amount of insurance effected by the policy. There is no limit to the possible liability under the four policies, except the amount that the companies stipulated it should not exceed, aggregating \$17,500, which they would have been obliged to pay if the loss had been total. Under an open policy if the loss is less than the insurance, the former measures the liability; but if the loss is greater than the insurance, the latter measures the liability, yet in either event the amount of insurance is the same. The amount of the insurance, therefore, is the largest sum that the company, under any circumstances, according to the terms of the policy, can be required to pay. This is the popular understanding as well as the legal definition. The test is what is the extent of the indemnity furnished under any possible circumstances? The insurance effected by the four policies was for a proportion of the cash value of the property less 20 per cent, which can always be represented by a fraction, the numerator being unchangeable, while the denominator may vary from time to time. The numerator is the highest amount which the companies could be required to pay, while the denominator is 80 per cent of the cash value of the property. The amount of the insurance does not vary, but the cash value of the property is subject to change, still that change does not reduce the amount of insurance. The fact that the owner ran his own risk, or became his own insurer as to the 20 per cent of the cash value of the property, did not lessen the amount of

insurance, because if the loss had been total the whole \$17,500 would have been due upon the four policies. Thus the effect of the co-insurance clause is that if the property is insured to 80 per cent of its value, or more, in case of a total loss the whole sum insured becomes due, but with insurance for less than 80 per cent of the value and a loss also of less than 80 per cent, the owner becomes, in effect, a co-insurer proportionately. He could have procured insurance to 80 per cent of the value, but not having done so he became his own insurer *pro tanto*. This accords with the way the clause is characterized in the policies, for it is entitled "Percentage Co-Insurance Clause," which means insurance by the company and the owner, depending upon the percentage or proportion which the insurance bears to the value. The object is through lower premiums to induce the owner either to take out insurance to 80 per cent of value, or to become a co insurer with less risk to the company in case of a loss falling below such percentage of value. Where either the loss or the insurance equals or exceeds 80 per cent of value, the clause has no effect, but when both are less, the insured and the insurer bear the loss in certain proportions. The amount of insurance is not the variable factor, but the amount of loss. The amount of insurance is at all times the same, but when the loss is partial the insurer stands only a part, unless the insurance is for the full percentage, whereas if the loss is total the insurer stands all, not exceeding the limit stated in the policy. That limit is the amount of insurance made by the policy, because the company may be required to pay to that extent.

The words of the co-insurance clause, viz., "the sum hereby insured," indicate the amount of insurance. That sum is fixed, definite and always the same. It should not be confounded with the actual liability under special circumstances, for all open policies are necessarily indefinite as to the sum to be paid until the amount of the loss is known. The liability can never exceed the value of the property, but the insurance may, for a house worth but \$1,000 may be insured for

\$2,000. If thus insured by two companies, one-half in each, and the property was wholly destroyed by fire, neither would have to pay \$1,000, the amount of its policy, but only \$500, the amount of its liability, owing to the apportionment clause. This would be true of a standard policy even if one of the companies was insolvent, so that the insured, by taking out other insurance, may reduce his security while intending to increase it. In the case before us the plaintiff, by procuring the four policies, reduced his security in the event of a partial loss, but increased it in the event of a total loss. For the purpose of apportionment, the face value of the policies should be resorted to, regardless of the cash value of the property, and thus the whole amount of the insurance can be ascertained by a simple inspection of the policies. The face value of a policy is not reduced by the actual value of the property or by the duty of apportioning the loss, or by the effect of a co-insurance clause in another policy on the same property. The amount of insurance is fixed at the inception of the policy, but the amount of liability is not fixed until a loss has occurred. The one depends upon the sum for which the policy is written, but the other depends upon a number of contingencies which may or may not happen, and hence cannot be known in advance. The fact that they are not known and may never come into existence does not affect the amount of the policy.

The question involved is new and we are without controlling authorities to guide us, but the discussion of a subject somewhat related in a recent case has aided us in reaching the conclusion announced. (*Continental Ins. Co. v. Aetna Ins. Co.*, 138 N. Y. 16, 21.)

It may be asked why, if the whole insurance was \$60,000, the plaintiff is not entitled to recover his entire loss, which was but \$45,321.18, and the answer is that he agreed in a certain contingency to stand part of the loss himself. He accepted four policies which provided for the payment to him of not exceeding \$17,500 in case of a total loss, or in case the loss was partial and his insurance amounted to 80 per cent of

N. Y. Rep.]

Statement of case.

the cash value, but he agreed that if both loss and insurance were each less than the 80 per cent to take less than the amount of his loss, and thus became a co-insurer for the difference. The defendant, pursuant to its apportionment clause, is entitled to the benefit of all other insurance, whether made by another company alone, or by a contract between another company and the insured, by which, in case of partial loss, each stands part as a co-insurer.

We think that the "whole insurance" was \$60,000, the face value of all the policies, and that the judgment appealed from should, therefore, be reversed and judgment ordered for defendant, on the merits, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

In the Matter of the Application of SAMUEL D. BAKER et al.,
Respondents, to Lay Out a Highway in the Town of Fort
Edward.

THE TOWN OF FORT EDWARD et al., Appellants.

HIGHWAYS—ORDER APPOINTING COMMISSIONERS UNDER SECTION 84, HIGHWAY LAW. Where a notice and petition in proceedings instituted under the Highway Law (L. 1890, ch. 568, § 84) to lay out a highway, states all of the facts required by the statute, the County Court has jurisdiction to make an order appointing commissioners, the effect of which is an adjudication that the persons appointed are eligible; the fact that it does not affirmatively appear in the order that such commissioners were "disinterested freeholders," residents of the town, but not of the county, which the statute requires them to be, is not a defect upon the face of the proceedings affecting the jurisdiction of the court.

Matter of Baker, 59 App. Div. 625, affirmed.

(Argued December 16, 1902; decided January 18, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 22, 1901, which affirmed an order of the Washington County Court confirming the report of commissioners in pro-

ceedings to lay out a highway and determine the damages that should be assessed therefor.

The facts, so far as material, are stated in the opinion.

Lewis E. Carr, Edgar Hull and Willard Robinson for appellants. The order appealed from should be reversed because it did not appear in the order appointing the commissioners or in the proceedings at any stage that the commissioners appointed were disinterested freeholders. That was a jurisdictional fact, and, not appearing, jurisdiction failed, and the action of the commissioners was a nullity. (L. 1890, ch. 568, § 84; *Matter of Houston St.*, 7 Hill, 175; *Frees v. Ford*, 6 N. Y. 176; *Judge v. Hall*, 5 Lans. 69; *Gilbert v. York*, 41 Hun, 594; *Thomas v. Harmon*, 122 N. Y. 84; *People v. Comrs. of Highways*, 27 Barb. 94; *People v. Williams*, 36 N. Y. 441; *Fitch v. Comrs. of Highways*, 22 Wend. 132.)

Fred A. Bratt and John B. Conway for respondents. The objection that it does not appear in the order appointing the commissioners or in the proceeding anywhere that the commissioners were disinterested freeholders is not well or seasonably taken. (*Matter of Southern Boulevard*, 3 Abb. [N.S.] 447; *Matter of Summit Ave.*, 35 Misc. Rep. 60; *Matter of Cooper*, 93 N. Y. 507; *Matter of Neville*, 17 N. Y. Supp. 774.)

HAIGHT, J. It is contended on behalf of the commissioners of highways that the order appealed from should be reversed, because it did not appear in the order appointing the commissioners or in the proceedings that the commissioners appointed were disinterested freeholders.

These proceedings were instituted by Samuel D. Baker and William E. Doig, who were residents of and liable to be assessed for highway labor in the town of Fort Edward, by first serving a written application upon the commissioners of highways of the town to alter and discontinue a highway,

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

describing it, and to lay out a new highway. This the highway commissioners neglected to do, and thereupon the applicants petitioned the County Court of Washington county to appoint commissioners pursuant to the provisions of section 84 of the Highway Law to determine the necessity of the proposed highway, and the uselessness of the highways proposed to be discontinued, and to assess the damages pursuant to the provisions of section 83 of the Highway Law. Thereupon the County Court made an order reciting the presentation of the petition, pursuant to section 83 of the Highway Law, praying for the appointment of commissioners, pursuant to section 84 of the law, and concluded by appointing three persons, naming them, commissioners, "for the purposes above described and in pursuance of the statute in such case made and provided, to hear, try and determine all questions involved and report thereon as required by law." Thereupon the commissioners so appointed took the oath of office prescribed by the Constitution and gave the notice required by the statute of the time and place for the hearing of the case. Upon such hearing the commissioners of highways of the town, with other persons, appeared and took part in the trial of the questions involved. A large amount of testimony was taken, and after the proofs were closed the commissioners made their report in favor of the petitioner, directing the laying out of the new highway and assessing the damages therefor. Application was then made on behalf of the petitioners to the County Court for a confirmation of the report, and upon such hearing the commissioners of highways, for the first time, raised the question that the record did not show that the commissioners were freeholders.

Section 84 of the Highway Law (L. 1890, ch. 568), so far as is material upon the question under consideration, provides as follows: "Upon the presentation of such petition, the county court shall appoint three disinterested freeholders, who shall not be named by any person interested in the proceedings, who shall be residents of the county, but not of the town wherein the highway is located, as commissioners to deter-

mine the questions mentioned in the last section." It will be observed that this provision of the statute does not prescribe the form of the order that shall be made or specify what it shall contain, but it does require that the appointment of commissioners shall be made by the court; that they shall not be named by any interested person and that they shall be disinterested freeholders and residents of the county, but not of the town in which the highway is sought to be laid out.

In *Matter of Beehler* (3 N. Y. S. R. 486-488) it is said: "The commissioners are to be selected by the court. The court in making its selection is required to select freeholders. No evidence is required to be presented to the court before the appointment is made showing who are or who are not freeholders, but the court must ascertain and determine this fact in its own way, and should it appoint any person not a freeholder, the appointment would be set aside and vacated upon motion when that fact was made to appear." The County Court is a court of limited jurisdiction, and in special proceedings, facts must affirmatively appear which give the court jurisdiction, and in the absence of such facts jurisdiction will not be presumed, as in the case of courts having general jurisdiction. (*Frees v. Ford*, 6 N. Y. 176; *Thomas v. Harmon*, 122 N. Y. 84; *Gilbert v. York*, 111 N. Y. 544.)

In this case, as we have seen, the proceedings were instituted by a notice and a petition addressed to the County Court which stated all of the facts required by the statute. It, therefore, gave the County Court jurisdiction to make a proper order in the proceedings. It gave to the County Court jurisdiction of the persons and the subject-matter; and if the County Court thereafter made any mistake in reference to its subsequent proceedings, it was an irregularity not affecting the jurisdiction of the court. While no fact will be presumed which does not affirmatively appear giving the court jurisdiction, yet when facts affirmatively appear which do give the court jurisdiction, the judge presiding, like any other officer, will be presumed to have discharged his duty, unless it otherwise appears. The court was asked to appoint com-

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

missioners pursuant to the provisions of the statute. This the court undertook to do. The statutes required the commissioners to be disinterested freeholders, residents of the county, but not of the town. None of the parties interested were permitted to make any suggestion to the court as to the persons who should be appointed, and obviously no evidence could be presented by them as to the qualification of persons whom the court should name. The duty, therefore, devolved upon the judge to ascertain the qualification of the persons in his own way, as stated in *Matter of Beehler* (*supra*). When, therefore, the order was made naming the commissioners it was in effect an adjudication that the persons appointed were eligible under the provisions of the statute. If it should turn out that the court was mistaken in reference to the qualification of either of the commissioners, it would be an error which could be corrected when the fact was made to appear, and it was not a jurisdictional defect.

In *Raymond v. Bell* (18 Conn. 81) it is said: "When it is seen that there is such jurisdiction as will support the proceeding; and this appears upon the face of the record, as in this case, it will be intended that the proceedings were regular; and an inferior court is as much entitled to the benefit of the maxim, 'that all its acts are to be presumed to be rightly done,' as any other." (Brown on Jurisdiction, § 20a; 17 Am. & Eng. Ency. of Law [2d ed.], p. 1082; *Sheldon v. Wright*, 5 N. Y. 497; *Comstock v. Crawford*, 3 Wall. 396.)

In the case of *Dederer v. Voorhies* (81 N. Y. 153-158) the action was brought to vacate an assessment which had been levied for the laying out of a highway. The action was sought to be maintained upon the ground that there were defects in the proceedings, and one was that it did not appear that the commissioners appointed were freeholders. In reference to that alleged defect, this court in its opinion said: "In regard to the alleged appointment of a person who was not a freeholder a commissioner, *which would not appear upon the face of the proceedings*, it is a sufficient answer to say that the court, by the appointment of the commissioner, adjudged

that he was such freeholder, and this is final unless corrected by a direct proceeding for that purpose. (*Van Steenberg v. Bigelow*, 3 Wend. 42.) *It is not a jurisdictional defect on the face of the proceedings.*" This was the unanimous decision of this court in that case, and it completely disposes of the question which we now have under review.

The cases of *People ex rel. Ottman v. Comrs. of Highways of the Town of Seward* (27 Barb. 94; affirmed, 30 N. Y. 470); *People ex rel. Dann v. Williams* (36 N. Y. 441); *Fitch v. Comrs. of Highways of Kirkland* (22 Wend. 132), relied upon by the appellant, have no application to the question under consideration. None of them were proceedings before the County Court, but were proceedings before the commissioners of highways and under a very different statute. Of course, when the commissioners are proceeding to lay out a highway on their own motion, or to remove an obstruction, and the statute expressly provides that it shall appear in the order filed by them "that all the commissioners of highways of the town met and deliberated on the subject embraced in such order, or were duly notified to attend a meeting of the commissioners, for the purpose of deliberating thereon," the proceedings are defective if all did not take part or have notice. The order was the first step in their proceeding. Neither one had jurisdiction to act without the other. Two had jurisdiction only in case the other had had notice to attend their meeting and deliberate with them upon the subject. Evidently these cases have no bearing upon the question of the jurisdiction of the County Court in a proceeding where the commissioners of highways had refused to act.

The commissioners of highways submitted no evidence to the court tending to show that the commissioners appointed were not disinterested freeholders as required by the statute. The objection made to the confirmation of the report of the commissioners rested solely upon the ground that it did not affirmatively appear that they were disinterested freeholders. No objection was taken to the commissioners at the time the

parties appeared before them at the trial of the questions involved. No objection was taken during the trial. The objection was reserved until after a long trial involving much expense, and was then made upon the application for the confirmation of the report. We think that even if there was a defect, it not being jurisdictional was deemed waived. In *Matter of N. Y., West Shore & Buffalo Ry. Co.* (35 Hun, 575) one of the commissioners appointed turned out not to be a freeholder. BRADLEY, J., in delivering the opinion, said: "But after jurisdiction is acquired such strict observance may be waived. The parties might dispense with the qualification of freeholder for the commissioner."

The order appealed from should be affirmed, without costs.

PARKER, Ch. J., O'BRIEN and CULLEN, JJ., concur; GRAY and BARTLETT, JJ., dissent; WERNER, J., absent.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant and Respondent, v. ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent and Appellant.

1. FRANCHISE TAX — COMPUTED ON ACTUAL, NOT PAR VALUE OF STOCK. Under sections 182 and 190 of the Tax Law (L. 1896, ch. 908) the actual, not the par, value of the capital stock of a corporation employed within this state is the basis for computing the franchise tax.

2. TAXABLE CAPITAL — ROLLING STOCK OF RAILROAD CORPORATIONS. The value of the rolling stock of a domestic railroad corporation, except that used exclusively outside of the state, is capital employed within this state.

3. NON-TAXABLE CAPITAL — PLEDGED STOCK OF FOREIGN CORPORATIONS. Stock of foreign corporations purchased by a domestic railroad corporation by the issue of bonds, the stock being pledged to a trust company in this state as collateral security for their payment, constitutes no part of its capital employed therein.

4. ANTICIPATED DIVIDENDS — BILLS RECEIVABLE — COAL AND SUPPLIES. The amount of "anticipated dividends on stock of other corpora-

tions owned by a domestic railroad corporation, the amount of bills receivable for expenditures on leased lines, and the value of coal and supplies owned by the corporation without the state," constitute no part of its capital employed therein.

5. STOCK OF DOMESTIC TRANSPORTATION COMPANY. The stock of a domestic transportation company employing the capital represented thereby outside the state, owned by a domestic railroad corporation, constitutes no part of the latter's capital employed therein.

Peo ex rel. N. Y. C. & H. R. R. Co. v. Knight, 75 App. Div. 169, modified.

(Argued November 18, 1902; decided January 18, 1903.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 20, 1902, which modified and affirmed as modified a determination of the defendant assessing a franchise tax against the relator for the year ending October 31, 1900.

The facts, so far as material, are stated in the opinion.

Ira A. Place for relator, appellant and respondent. The fact that relator's holdings of capital stock in certain foreign corporations were acquired and paid for by and with the proceeds of bonds issued by relator constituted no reason against such investments being accounted portions of relator's total capital or assets. (L. 1896, ch. 908; L. 1880, ch. 542; L. 1881, ch. 361; L. 1885, ch. 359; L. 1889, chs. 193, 353; L. 1890, ch. 522.) The fact that such capital stock was, during the tax year, deposited within this state as collateral security for such bonds, did not operate to render relator's property therein "capital employed within this state" within the meaning of the Tax Law. (*People ex rel. v. Knight*, 75 App. Div. 164.) Relator's capital stock employed within this state for the year ending October 31, 1900, was not lawfully taxable for that year upon a basis in excess of its par value. (*People ex rel. v. Roberts*, 168 N. Y. 14; *People v. D. & H. C. Co.*, 54 Hun, 598; *Torrey v. Milbury*, 21 Pick. 64; *Adam v. Bancroft*, 3 Sumn. 386; *Clark v. Norton*, 49 N. Y. 243; *People ex rel. v. Carter*, 52 Hun, 458; *McClusky v. Cromwell*, 11 N. Y. 593; *C. C. T. Co. v. K. R. R. Co.*,

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

154 N. Y. 493; *Smyth v. Ames*, 169 U. S. 466; *Louisiana v. Pilsbury*, 105 U. S. 278.)

John C. Davies, Attorney-General (*Henry B. Coman* of counsel), for defendant, respondent and appellant. In all cases where a corporation pays dividends amounting to less than six per cent the tax is to be computed, not upon the amount of capital stock at par, but upon the appraised capital, the value of which is to be determined in the manner prescribed in section 190 of the Tax Law. (*People ex rel. v. Roberts*, 168 N. Y. 14; *People v. D. & H. C. Co.*, 54 Hun, 598; *People ex rel. v. Wemple*, 150 N. Y. 46.) The stock of the Lake Shore and Michigan Southern railroad is not capital nor assets of the relator, and should not be considered in computing the tax. (*Hill on Trustees*, 229; 27 Am. & Eng. Ency. of Law, 126; *Tiffany & Bullard on Trustees*, 772.)

HAIGHT, J. I concur in the conclusions reached by O'BRIEN, J., except as to that part thereof which holds that the item of \$15,230,186.06 is not taxable. The court below found that this item represented the rolling stock employed outside of the state, it "being such proportion of all of relator's rolling stock as the mileage thereof without the State bears to the entire mileage of said rolling stock." As I understand this finding it is to the effect that the rolling stock of the relator is used in this state and outside of the state; that is, cars are loaded at some point in the state, as for instance in the city of New York and run over the relator's road to some other point, say, the city of Buffalo. They then are transferred on to other roads and are run to points outside of the state where they are unloaded and then reloaded and returned to this state. The entire mileage includes that traveled in this state as well as that out of the state; this, with the distance traveled outside of the state and the total value of the stock, furnishes the proportion upon which the computation is made.

The question is as to whether this stock is taxable under the statute. The relator is a domestic corporation. It owns the rolling stock. It is used upon its lines of railroad in this state. True, the cars are transferred on to other roads and are run outside of the state for the purpose of facilitating the transportation of persons and freight without change of cars or of breaking bulk, but the use of the cars outside of the state is but temporary, for they are returned as soon as reloaded and are again used in the transportation of persons and property within this state. It seems to me, therefore, that, under a fair and reasonable construction of the statute, this item should have been included as capital employed within this state.

Under the findings of the court below, as we understand them, the average amount of the relator's capital stock during the year was \$108,750,000; the average price was \$129.8125, making the average cash value of the relator's capital stock for the year \$141,171,093.75. The entire amount of the relator's total assets was \$337,760,785.52, and the portion of such assets as used in this state \$205,029,380.45, to which sum should be added the relator's rolling stock, \$15,230,186.06, making the total assets used within the state \$220,259,566.51. The statement would thus be

$$x : 141,171,093.75 :: 220,259,566.51 : 337,760,785.52.$$

Under this statement $x = \$92,060,076.91$, the amount to be assessed at one and one-half mills, which amounts to \$138,090.11.

In view of the fact that there is no express finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the state, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the state, and if it should be found that such was the fact, the amount thereof should be deducted and the order of the Appellate Division and that of the comptroller should be modified accordingly, without costs to either party.

O'BRIEN, J. This appeal presents a controversy between the relator and the state concerning the amount of the annual franchise tax for the year ending October 31, 1900. The statute prescribes that this tax must be computed upon the basis of the amount of the relator's capital stock employed within this state. The main contention of the learned counsel for the relator is that the computation should be made upon the stock so employed at its par and not its actual value, and, hence, the determination now here for review is erroneous since the computation was made upon the latter principle. The language of section 182 of the Tax Law would seem to support the relator's contention, but this court has recently held that this section must be read with section 190, and when so read the basis for the tax is the actual and not the par value of the stock. (*People ex rel. N. Y. & E. R. Ferry Co. v. Roberts*, 168 N. Y. 14.) In the present case it would, doubtless, be to the advantage of the relator to have the tax based upon the par value of the stock, since that value is much less than the actual value and the dividends are only five per cent, but in case of a corporation that had paid even a smaller dividend and whose stock was much below par it would be decidedly to its disadvantage. By reading the two sections together absurd and unequal results are avoided. The two sections are apparently conflicting. In such cases it is the duty of courts to reconcile contradictory or conflicting provisions when possible, and the case cited is a precise authority for the principle that the tax should be based upon the actual value. This permits the statute to operate in a way that is reasonable and just while the other view would render it even more confusing than it now is. Courts cannot always follow logical reasons when dealing with a complicated statute constructed without much method or system in the arrangement of its different parts and lacking in clearness and precision of language.

Passing from this question of construction, there is nothing left of the controversy on either side save the proper application of the rule and the principles upon which the actual

value of the relator's capital in this state is to be ascertained. With respect to this question it should be noted at the outset that the writ of certiorari was made returnable at the Appellate Division and the issues were there tried and heard upon the relator's petition, the writ and the return of the comptroller, including the papers attached thereto. The general and primary question that the court had before it for decision was one of fact, and that was the actual value of that part of the relator's capital employed within this state, and upon that question the learned court made findings upon which its general conclusion is based. In the main we think these findings are correct. There is one item of property which the court found, as matter of fact, to be employed outside the state, which, nevertheless, it felt constrained for some reason that does not distinctly appear to include as part of the property or capital stock employed in this state. It may be that this is an inadvertence or oversight, but it will be referred to more fully hereafter. The learned court in stating the account excluded certain items of property which the learned attorney-general contended and still insists should be included, and the ground upon which they were excluded from the calculation was that they either represented property employed outside the state or did not in any legal sense constitute capital at all. A very brief reference to these items will show that the action of the court below was correct.

(1) The relator held \$90,578,400 of the stock of the Lake Shore and Michigan Southern Railway Company and \$18,900,825 in the Michigan Central Railroad Company. This stock was part of the relator's capital or general assets. Both companies are foreign corporations, the former being partly within and partly without the state and the latter entirely without the state. This stock was purchased by the relator by the issue of bonds and the stock was pledged to a trust company as collateral security for the payment of the bonds. The relator being the owner of these stocks, they constituted part of its capital, but that part of its capital was not employed within this state, and so this court has held. (*People ex rel.*

Edison El. L. Co. v. Campbell, 138 N. Y. 543; *People ex rel. Edison El. L. Co. v. Wemple*, 148 N. Y. 690.) In the former case Judge EARL, speaking for this court, said: "The stock which the relator took in companies organized outside of this state stood for so much of the relator's capital invested outside of the state. It took a portion of its capital, to wit, a portion of its patent rights, and employed it outside of the state to purchase those stocks. Its property in those corporations represented by its shares of stock was outside of this state and was in no sense employed here. Those stocks had no *situs* here and were not taxable here under any system of taxation which has ever existed in this state." In the case at bar the stock was purchased, not with patent rights, but with the bonds of the company sought to be taxed. The form of the consideration, however, can make no difference, and so long as that part of the relator's capital represented by the purchase was employed outside of the state it should not be included. Nor can it be important that the stock had for convenience been used as a security upon deposit as collateral for the bonds in a trust company located in this state.

(2) The court below found that a certain portion of the relator's rolling stock, that is to say, its cars, both freight and passenger, was employed outside the state, the proportion being estimated on the mileage or wheelage basis at \$15,230,186.06. The court excluded this item from the calculation on the authority of *People ex rel. Lackawanna Transp'n. Co. v. Knight* (75 App. Div. 164). It was there held that the term "employed within this state," used in section 182, did not mean simply the legal *situs* of the property, and this principle was decided in other cases. (*People ex rel. Chicago Junction, etc., Co. v. Roberts*, 154 N. Y. 1; *People ex rel. Washington Mills Co. v. Roberts*, 8 App. Div. 201; affirmed on opinion below, 151 N. Y. 619.) It is obvious that since the relator is a great interstate railroad traversing the continent that a large proportion, or at least some, of its rolling stock must be always employed outside of the state. It may be that

the *situs* of all the relator's property is in the state of its creation, but, as already remarked, the question is not where the *situs* is, but where the property is employed. It may be that various states through which the relator's railroad is operated impose taxes upon such part of its property as upon the basis adopted here is found to be employed in these states respectively, so we think that the learned court below was correct in excluding this item from the estimate of the relator's property employed within this state. The relator is practically operating a continuous line of railroad from New York to Chicago and beyond. It not only owns nearly \$110,000,000 of the stock of the western connecting roads, as shown by the record, but is operating these roads as western connections either under leases or traffic agreements. It is practically the owner of these roads just as it is the owner of the West Shore in this state. The operations of the Central do not stop at Buffalo, but extend beyond and through Canada and various western states. It owns these western roads by practically as good a title as it owns the West Shore in this state, and, hence, as already observed, it is operating a continuous line of railroad from the Atlantic seaboard through various states of the west. The part of the line beyond the limits of this state is longer than that part from New York to Buffalo, and the local and through traffic is immense. Therefore, to contend that all the rolling stock of the relator is "employed in this state" would seem to me to be an indefensible proposition. Certainly some of it must necessarily be employed in other states. It cannot all be employed at the eastern end of the line. If so, then the part of the rolling stock employed outside and inside of this state is a question of fact and the court below has found that a designated part of the rolling stock is employed without the state. This court has no power to interfere with that result unless it can say that there is absolutely no evidence in support of the finding. It cannot say that for the plain reason that, as appears from the record, there was evidence on that subject and no one claims otherwise. It has the power to say that, granting to the full extent the fact found as to the

employment of part of the rolling stock out of this state, yet as matter of law, since the relator is a domestic corporation and the *situs* of all its personal property is here, all the rolling stock is employed in this state. But such a decision would seem to me to be not only plainly wrong in principle, but sharply opposed to many decisions of this court, some of which are cited above. The stock of the western railroads, amounting to nearly \$110,000,000, and the coal and other personal property that we have just held is not employed in the state, is owned and held here in just the same sense as the rolling stock, and why this property is employed outside the state, and all the rolling stock within the state is not made very clear to me, and, therefore, I am in favor of accepting the finding of the trial court that a certain and designated part of the cars and engines of the relator are employed outside of the state.

(3) The learned court below found that three other items of the relator's property, amounting in the aggregate to \$1,236,871.17, was not capital at all, or at least was not employed in this state. This general item was made up of the sum of \$965,217.97 for "anticipated dividends" on stock of other corporations which the relator owned. The dividends had not been declared, and were, therefore, a mere incident to the stock. It seems to be conceded by both parties that this item was properly excluded. The second item embraced in the general amount above stated was \$171,653.20 for bills receivable. This sum appears to have been made up of expenditures by the relator on leased lines. No direct return is expected for these expenditures and the relator holds no obligation for reimbursement, although carried on the books as "Bills receivable," and so the court below properly held that this item constituted no part of the relator's property within this state for the purposes of the franchise tax. The third item entering into the general sum above stated was \$100,000 for coal and supplies without the state. It is hardly conceivable that all the coal which the relator uses in the operation of its railroad can be said to be employed within

this state, and so this item was properly found to be property not employed in this state. There was no error in the decision of the court below excluding these three items from the calculation.

(4) The relator owned \$2,597,400 of the capital stock of the Merchants Dispatch Transportation Company, a domestic corporation engaged in the transportation business. Eighty-nine per cent of that amount, or \$2,311,686, represented business of that company outside the state, and although these facts are found by the learned court below, it included the latter amount in its valuation of the relator's property employed within this state. Since the relator's holdings in this company were employed outside the state we think they should not be included in the calculation under the authorities cited above. It is very difficult to see how a distinction was made between those items and the other items referred to which the learned court below excluded. It seems to have been assumed that since this stock was that of a domestic corporation it constituted a part of the relator's property employed in this state; but, as already observed, the legal *situs* of the property does not determine the question, and since the learned court below found that the transportation company that issued the stock employed the capital represented thereby outside the state it is difficult to understand how the relator, by the mere fact of its ownership of the stock, could employ the capital represented by it in this state. With respect to this item, we think that the decision of the learned court below should be corrected by the proper modification.

By a process of calculation which is not questioned here by either party, except as to the matters above referred to, the learned court below found, as stated in the opinion, that the amount of the relator's capital employed within this state upon which the tax should be computed was \$90,151,825.98, but since that amount was the result of an error in including a portion of the stock of the transportation company employed without the state, namely, the sum of \$2,311,686, the calculation and estimate should be corrected upon the principles

adopted as to the other items, and this process, which seems to have been finally adopted by the court below in the official report of the case, will give the following result: The percentage of its entire capital employed within the state during the year was .60702, or over sixty per cent. The average amount of its entire capital stock at par was \$108,750,000, and the average share price was \$129.8125, making the average value for the average amount of stock \$141,171,093.75, and the amount upon which the tax of one and one-half mills should be computed \$85,694,383.18, and the amount of the tax \$128,541.57. There is a material discrepancy between the amount upon which the tax is to be computed as stated in the opinion of the learned court below and that stated in the findings. In the former, as already observed, the amount stated as the basis of the tax is \$90,151,825.98 and the tax \$136,227.73, while the actual finding of the court is that the amount upon which the tax should have been and should be computed is \$86,659,287.62, and the tax should have been and should be \$129,988.93. The discrepancy may, no doubt, be accounted for by assuming that the court below, in making up the judgment, did not follow the opinion. However that may be, it will be seen that the result expressed in the findings below makes the tax somewhat larger than the result at which we have arrived. The opinion of the court below as found in the record differs materially from that contained in the official report of the case (75 App. Div. 169). In the latter the case seems to be decided upon the principles herein stated, the slight differences in results being due to an error in the figures.

The order of the Appellate Division should be modified accordingly, with costs to the relator in this court.

PARKER, Ch. J., BARTLETT, MARTIN and CULLEN, JJ., concur with HAIGHT, J.; O'BRIEN, J., reads for modification of order; VANN, J., absent.

Ordered accordingly.

CATHERINE TAYLOR, Respondent, v. WASHINGTON H. TAYLOR,
Appellant.

1. ACTION FOR A SEPARATION. Where it appears, in an action for separation and alimony brought by a wife against her husband, that prior to a ceremonial marriage between plaintiff and defendant in 1871 plaintiff had married another, with whom she lived about two years, when he disappeared; that long before her marriage to defendant she was unable to learn anything of her first husband's whereabouts by diligent inquiry; that she had believed him to be dead for a period of more than five years prior to her marriage to defendant; that he did die in 1878, which fact was communicated to plaintiff and defendant shortly thereafter; and that, with knowledge thereof, they continued to live together as man and wife, holding themselves out as such to the world for a period of about eleven years and until the year 1889—these facts, together with a finding that defendant had abandoned plaintiff and refused and neglected to support her, furnish sufficient support for a judgment of separation and for an allowance of alimony.

2. COUNTERCLAIM THAT PLAINTIFF HAD HUSBAND LIVING. Where the answer contains a counterclaim that the plaintiff had a husband living at the time of her marriage with defendant, but under the reply she is entitled to offer proof of a later contract of marriage than the ceremonial marriage, a motion for judgment annulling the latter marriage, at the beginning of the trial, is properly denied.

3. WHEN VOIDABLE MARRIAGE NOT A GROUND FOR DISMISSAL OF THE COMPLAINT. Where defendant moved, after the plaintiff had rested, to dismiss the complaint upon the ground that plaintiff's first husband was alive at the time of her marriage to defendant, and the only evidence thereof was in plaintiff's reply, which, taken as a whole, brought the marriage to defendant within the statutory definition of "voidable marriages" (L. 1896, ch. 272, § 4), the motion is properly denied.

Taylor v. Taylor, 63 App. Div. 231, affirmed.

(Argued December 17, 1902; decided January 13, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 12, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

David B. Hill, Robert M. Moore and William W. Cantwell for appellant. The motion for judgment upon the counterclaim, made at the opening of the case, and for a dismissal of the complaint, at the close of the plaintiff's case, should have been granted, and the exceptions to the denial of those motions were well taken. (*Amory v. Amory*, 6 Robt. 514; *Clark v. Clark*, 5 Hun, 340; *J. W. B. v. F. D. B.*, 11 N. Y. Leg. Obs. 350; *McNamara v. McNamara*, 9 Abb. Pr. 18; *De Meli v. De Meli*, 67 How. Pr. 20; *Leslie v. Leslie*, 11 Abb. Pr. [N. S.] 311; *Anonymous*, 17 Abb. Pr. 48; *Doe v. Roe*, 23 Hun, 19; *Fullmer v. Fullmer*, 6 Wkly. Dig. 22, 42; *Campbell v. Campbell*, 12 Hun, 636; *Blanc v. Blanc*, 67 Hun, 384.) The judgment of separation is not based upon the issues presented by the pleadings or the theory upon which the trial was conducted, and the court erred in rendering judgment upon a common-law marriage in the absence of any such allegation in the pleadings and expressed statement of counsel for the plaintiff, that the plaintiff did not rely upon a common-law marriage, but upon a ceremonial marriage as alleged in the complaint. (*Wright v. Delafield*, 25 N. Y. 266; *Day v. New Lots*, 107 N. Y. 155; *Biershenk v. Stokes*, 7 Misc. Rep. 692; *Romeyn v. Sickles*, 108 N. Y. 651.)

Alexander S. Bacon for respondent.

PARKER, Ch. J. We are unable to consider the very interesting questions presented by appellant's counsel on this review for the lack of exceptions properly presenting them.

The trial court found that prior to the ceremonial marriage of plaintiff and defendant, and on January 12, 1860, plaintiff married one James Dennis, with whom she lived until 1862, when he disappeared; that long before her marriage to defendant she made inquiries about Dennis among his friends and others with the result that she was unable to learn anything of his whereabouts; that she had believed him to be dead for a period of more than five years prior to her marriage to defendant; that he did die in 1878, which fact was communi-

cated to plaintiff and defendant shortly thereafter and that, with knowledge thereof, they continued to live together as man and wife, holding themselves out as such to the world for a period of about eleven years, and until the year 1889, thereby creating a new and valid marriage contract.

These facts, together with a finding that defendant had abandoned plaintiff and refused and neglected to support her, furnish sufficient support for the judgment of separation directed by the trial court and for an allowance of alimony.

These findings of fact having been unanimously affirmed by the Appellate Division, our inquiry must be confined to two exceptions which are to be found in the record.

In order to appreciate their force it will be necessary to briefly refer to the pleadings. The complaint alleges a ceremonial marriage between plaintiff and defendant on January 6, 1871; their living together as husband and wife until 1889; cruel and inhuman treatment on the part of defendant without cause or provocation by plaintiff; her abandonment by defendant with failure on his part to contribute toward her support, and demands judgment for separation with a reasonable provision for her support.

The answer admits the ceremonial marriage alleged in the complaint, but denies that it was legal or valid because of a prior marriage between plaintiff and one James Dennis, which was in force at the time of the ceremonial marriage between plaintiff and defendant, and demands judgment in his favor declaring the marriage contract between plaintiff and defendant void and annulling the said marriage.

The reply denies that defendant was without knowledge of plaintiff's prior marriage; alleges that for more than five years immediately preceding her marriage with plaintiff Dennis had absented himself from plaintiff, and that she was informed and verily believed that he was dead, all of which was known to defendant, and that for more than ten years after the death of Dennis plaintiff and defendant lived together as man and wife under a valid contract of marriage.

The cause coming on for trial defendant's counsel moved

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

for judgment, upon the counterclaim contained in the answer, annulling the marriage alleged to have taken place between plaintiff and defendant in 1871. This motion was denied, and properly so, for the reason that under the reply plaintiff was entitled to offer proof of a later contract of marriage than the ceremonial marriage of 1871, for the reply alleged, as we have noted, that for more than ten years after the death of Dennis plaintiff and defendant lived together as man and wife under a valid contract of marriage.

After plaintiff had rested, the following took place: "Defendant's counsel moved for judgment dismissing the complaint, on the ground that the evidence discloses the fact that the plaintiff was married in 1860; that her husband was alive at the time of the marriage to Mr. Taylor, in 1871, and that the evidence fails to disclose the contraction of any common-law marriage. Plaintiff's counsel: We have not offered any evidence of that sort that I am aware of. We rested on the Methodist marriage in 1871. Defendant's counsel: The plaintiff stated that they rested on the marriage of 1871, and the evidence disclosing the fact that the marriage was at least voidable; and we having asked for a decree voiding that marriage, it seems to me the plaintiff's case must fail upon that state of facts. Motion denied; exception."

It will be noted that defendant did not move for judgment upon the counterclaim alleged in his answer, as he had upon the opening, and if he had it may well be that the question would have been presented whether the matter alleged constituted a good counterclaim, for while it is true that when plaintiff rested no evidence had been offered tending to show a common-law marriage after the death of Dennis, the pleadings established that fact, so that the case stood at that time precisely as if plaintiff had proved the ceremonial marriage between herself and defendant in 1871, whereupon defendant had proved plaintiff's marriage with Dennis many years before, and that he did not die until 1878, and plaintiff had thereupon rested without attempting to prove a marriage contract between the parties to the action made subsequent to the

death of Dennis or any other fact, except that when she married plaintiff, and for five years before, she believed Dennis to be dead. But that was not the motion made.

What the defendant's counsel asked the court to do was to dismiss the complaint "on the ground that the evidence discloses the fact that the plaintiff was married in 1860; that her husband was alive at the time of the marriage to Mr. Taylor in 1871."

No witness testified to that fact and the only evidence of it from the standpoint of defendant was in plaintiff's reply, and it must be considered in connection with the rest of the paragraph which, as a whole, is to the effect that while she was married to Dennis he had absented himself for more than five years preceding her marriage with defendant, during which time she believed he was dead, all of which was known to defendant. Taking the entire paragraph—as defendant must if he uses any portion of it as an admission (*Gildersleeve v. Landon*, 73 N. Y. 609)—the situation presented to the court was one where the ceremonial marriage contract between plaintiff and defendant in 1871 was not void but voidable, for the Revised Statutes provide (Laws of 1896, ch. 272, § 3): "Void Marriages.—A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless * * * such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time." Section 4 of the same act provides: "Voidable Marriages.—A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto * * * has a husband or wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time."

Plaintiff's reply brought her marriage with defendant within section 4, and, therefore, as the case stood when defendant moved to dismiss the complaint, all defendant could claim,

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

after invoking the reply in his behalf, was that the marriage between plaintiff and defendant was voidable. That being the situation, the court was not at liberty to dismiss the complaint although it would have been quite otherwise had the pleadings, considered in connection with the testimony, brought the case under section 3, for then the marriage contract would have been wholly void.

It is said that — the cause having been tried by plaintiff and defendant upon the theory that plaintiff relied solely upon the marriage in 1871 — it was error for the trial court to find in effect that there was a common-law marriage between plaintiff and defendant after the death of Dennis. We are unable to find any exception that presents that question. The exception taken to the motion to dismiss the complaint — which we have been considering — is the exception relief upon, but it is not available for that purpose, as it was an exception taken to a denial of a motion and not to a comment of plaintiff's counsel or to a ruling of the court based upon an admission of plaintiff's counsel. His statement, in substance, was that he had not offered any evidence of a common-law marriage, but rested upon the Methodist marriage of 1871, and that is true, as the record discloses. Later on he offered evidence tending to show a common-law marriage after the death of Dennis; and he was at perfect liberty to do so provided the evidence offered was within the issues as framed by the pleadings; and if it was not, it was the plaintiff's privilege to attempt to exclude the evidence by objection, but he did nothing of the kind. And so without objection of any kind plaintiff was in the end permitted to prove such facts as induced the trial court to find a common-law marriage between plaintiff and defendant after the death of Dennis, which, as we have seen, furnished with the other facts found sufficient support for the judgment rendered.

The judgment should be affirmed, with costs.

GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ., concur;
CULLEN and WERNER, JJ., absent.

Judgment affirmed.

CONTINENTAL NATIONAL BANK OF NEW YORK, Appellant, v.
TRADESMEN'S NATIONAL BANK OF NEW YORK, Respondent.

1. BANKING — NEGLIGENCE CERTIFICATION OF DRAFT — MONEY PAID BY MISTAKE. A bank which has negligently certified a raised draft cannot recover back its amount, as moneys paid by mistake, from another bank with which the draft was deposited, and which, relying upon the negligent acts of the former bank in certifying, accepting and paying the draft, parted with the moneys upon the demand of its depositor.

2. APPEAL — CHARGE MUST BE CONSIDERED IN ITS ENTIRETY. An objectionable statement in a charge should be considered in connection with the whole of the charge upon the subject, and error can only be predicated if, upon such consideration, it is plain that the jury may have been misled as to the scope of their investigation.

3. BANKS — CERTIFICATION OF DRAFT — ESTOPPEL. The liability of a bank to bear the loss arising from its negligent certification of a raised draft, the amount of which it paid to a bank with which the draft had been deposited, and which, in reliance on the acceptance, payment and retention of the instrument by the certifying bank, paid the depositor, rests, not upon the mere certification, but upon the estoppel arising from its subsequent acts and continued negligence until it was too late to protect itself or the bank with which the draft was deposited from loss.

4. TRIAL — PAYMENT OF DRAFT — QUESTION FOR JURY. It is a question for the jury, to be determined upon consideration of the rules of the clearing house and the evidence, whether a bank, which made payments to a depositor upon the faith of a raised draft which had been certified by another bank and which had been sent to the clearing house, was warranted in considering the draft as one that had been paid, and whether it acted in good faith in paying out the moneys to its depositor.

5. APPEAL — REFUSAL TO CHARGE — REPETITION. The refusal of a requested charge is not erroneous when its subject-matter has been sufficiently covered by the charge already given.

Continental Nat. Bank v. Tradesmen's Nat. Bank, 59 App. Div. 103, affirmed.

(Argued November 21, 1902; decided January 20, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 4, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The action was brought to recover \$7,584, with interest; a

sum, which, as the complaint alleges, was paid by the plaintiff to the defendant under a mistake of fact. The following facts were disclosed by the evidence upon the trial. A cashier's check, or draft as it is sometimes spoken of, was drawn by the Philadelphia National Bank, of Philadelphia, Pennsylvania, upon the plaintiff, to the order of Henry F. Thompson, for \$76.00 and bore the date of June 7, 1894. With the date altered to June 12, 1894, and the sum payable raised from \$76.00 to \$7,660, this check was presented by some one, on June 13, 1894, to the plaintiff's paying teller, with a request for its certification. It was certified and, on the same day, it was deposited with the defendant to the credit of the payee, Thompson; with whom, some time previously, an account had been opened as a depositor. On the morning of June 14th, the defendant sent the check for payment by the plaintiff through the clearing house, in New York city, and the same was paid in the exchanges of the day; both banks being members of the Clearing House Association. Between two and three o'clock of the same day, Thompson drew out from the defendant, upon his checks, all of the moneys standing to his credit in account, except the sum of about \$660; disappeared and was never found. Later in the afternoon, between four and five o'clock, the plaintiff's clerks discovered that the check had been fraudulently raised and at once looked up, and gave notice to, the defendant's cashier. This action was then instituted to recover the amount, which the plaintiff had paid out upon the certified check, in excess of the amount for which it had originally been issued to its payee.

It appears that the Philadelphia bank kept a deposit account with the plaintiff, upon which it would draw, in the form of cashier's checks. When its account was drawn upon in this way, it was accustomed, upon the same day, to advise the plaintiff by letter of the same and that practice was followed in the present instance. The letter of advice was received by the plaintiff and was handed to the proper bookkeeper; whose duty it then became to keep, and to observe, the same

for the purposes of comparison with the check when presented. Such cashier's checks bore serial numbers and these numbers would be stated in the letters of advice. That was, also, done in the present instance. When, on June 13th, certification of this cashier's check was demanded, the teller asked of the bookkeeper about its correctness, exhibiting it to him, and he received an affirmative answer. As was his duty, he made the requisite entries of the certification, except that he omitted to enter the serial number which the check bore. When, in the afternoon of the day, the bookkeeper came to post his books, he observed that the serial number of the check, which had been certified, was lacking in the teller's entry of the certification and the general bookkeeper's attention having been called to this important omission, he said that they would wait until the check came in. On the following morning, the check was received from the clearing house by the plaintiff; but the discovery of its fraudulent alterations, in date and in amount, was not made until after four o'clock in the afternoon and resulted, then, from comparison with the letter of advice. According to the rules and practice with respect to clearances of checks, drafts, etc., by banks, which are members of the Clearing House Association, the same are brought to the clearing house at ten o'clock in the morning of the day following their deposit and such exchanges are then made between the various banks that, within half an hour, each bank has received back the drafts made upon it. Its account with the clearing house will then make it appear, either, as a debtor, by reason of the sum total of the drafts upon it exceeding in amount that of those held by it upon other banks, or as a creditor, if the converse be the fact. If it is a debtor in the day's exchanges, it must pay the balance appearing against it between 12.30 and 1.30 o'clock to the manager of the clearing house; while if a creditor, it must receive the balance appearing due to it from the manager at 1.30, or as soon thereafter as the amounts can be made up and proved. By another provision of the clearing house rules, all checks, drafts, etc., which are missent, or are not good, for any cause, are to be

returned on the same day to the bank, from which they came, and claims arising upon the same are to be adjusted directly with the particular bank concerned, and "should be made before 3 o'clock of the same day." On June 14th, both the plaintiff and the defendant appeared, as the result of the day's exchanges, to be creditors of the clearing house and the balances in their favor were paid by the manager.

It was proved that, upon the receipt by the plaintiff from the clearing house of the checks, drafts etc. in the exchanges of the morning, according to the usual practice; the same were sorted in convenient bundles; the certified checks being separated for comparison with entries. All checks were, finally, canceled by perforation and this procedure never occupied to exceed three hours of time; being, therefore, presumably completed, by, or before, 1.30 o'clock. It, also, appeared that Thompson, the payee of the check and depositor with the defendant, was unknown to the latter; having been recently accepted as a customer, without any reliable information concerning him. When he desired to draw out the moneys from the defendant, between two and three o'clock of the afternoon of June 14th, the paying teller first ascertained that his checks were drawn upon a deposit account made up, with the exception of a few dollars, from the previous day's deposit of the certified check and then paid out the moneys in reliance thereupon. The defendant's paying teller, also, testified that, in the course of his experience, the custom was for banks to make reclamations between half-past twelve and half-past one o'clock of the day and they were made upon the paying teller.

The case was submitted to the jury and a verdict was rendered for the plaintiff for a sum, which represented the balance remaining with the defendant to the credit of its depositor and which defendant conceded to the plaintiff. The judgment upon the verdict has been unanimously affirmed by the Appellate Division, in the first department, upon the plaintiff's appeal from the unsatisfactory verdict, and an appeal has been, further, taken to this court.

George W. Wickersham for appellant. The court erred in instructing the jury that the question for their determination was whether or not the plaintiff was guilty of culpable negligence in certifying the draft in question. (*M. Nat. Bank v. Nat. City Bank*, 59 N. Y. 67; *Clews v. Bank of New York*, 89 N. Y. 418; *People v. Koerner*, 154 N. Y. 355; *People v. Helmer*, 154 N. Y. 596; *Chapman v. E. R. Co.*, 55 N. Y. 579; *Philips v. N. Y. C. & H. R. R. Co.*, 127 N. Y. 657; *Gossler v. Lissberger*, 19 N. Y. Wkly. Dig. 429; *Gillespie v. D. D., E. B. & B. R. R. Co.*, 12 App. Div. 501; *C. E. Bank v. A. D. & T. Co.*, 149 N. Y. 714.) The defendant failed to show that it paid out its money to its depositor after payment to it by plaintiff of the amount of the fraudulently raised draft, or in reliance upon such payment. (*Thornton v. Rogers*, 75 Hun, 243.) The court erred in submitting the construction of the clearing house rules to the jury. (*Finlayson v. Wiman*, 84 Hun, 327; *Dwight v. G. L. Ins. Co.*, 103 N. Y. 352; *M. Nat. Bank v. N. E. Bank*, 101 Mass. 281; *Nat. Bank of N. A. v. Bangs*, 106 Mass. 441; *N. Nat. Bank v. Nat. Bank*, 139 Mass. 513; *Northrup v. Porter*, 17 App. Div. 80.) The fact that plaintiff's mistake was due to carelessness or that it had the means of discovering the mistake which, had it then availed itself of, would have prevented the mistake from being made is no defense to the action. (*Lucas v. Worsick*, 1 M. & R. 293; *Kelly v. Solari*, 9 M. & W. 54; *Bell v. Gardiner*, 4 M. & G. 11; *Townsend v. Crowdy*, 8 C. B. [N. S.] 477; *U. Nat. Bank v. S. Nat. Bank*, 43 N. Y. 452; *Lawrence v. A. Nat. Bank*, 54 N. Y. 432; *Nat. Bank v. Nat. M. Bank*, 55 N. Y. 211; *C. E. Bank v. Nassau Bank*, 91 N. Y. 74; *C. Nat. Bank v. N. River Bank*, 44 Hun, 114; *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun, 475.) The court erred in refusing to charge that the plaintiff owed no duty to the defendant to compare the draft in question with the letter of advice from the Philadelphia National Bank before accepting the same, and making no representation to the defendant as to the genuineness of the body of the draft, it is not now estopped from showing that the

N. Y. Rep.] Opinion of the Court, per GRAY, J.

money was paid under a mistake of fact and should be refunded. (*Clews v. Bank of N. Y.*, 89 N. Y. 418.) The court erred in instructing the jury that it was for them to determine whether or not with knowledge of the facts which had been communicated to the officers of the Continental Bank it was culpable negligence on their part to receive this draft as they did on the morning of June fourteenth at about half-past ten o'clock without examination or verification and to retain it until after two o'clock. (*Frank v. Lanier*, 91 N. Y. 112; *F. Nat. Bank v. M. Nat. Bank*, 76 Hun, 475.)

Charles E. Rushmore for respondent. There was no error in the charge of the trial judge. (*Gillespie v. D. D., E. B. & B. R. R. Co.*, 12 App. Div. 503; *Caldwell v. N. J. S. Co.*, 47 N. Y. 282; *Crist v. E. Ry. Co.*, 58 N. Y. 633.) Culpable negligence in the certification of a check should defeat a recovery of the money paid on it, where the defendant has parted with value on the faith of the certification and payment of the check, or on the certification alone. (*Mayer v. Mayor, etc.*, 63 N. Y. 457; *F. Nat. Bank v. Leach*, 52 N. Y. 53; *M. Nat. Bank v. N. C. Bank*, 59 N. Y. 72; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Nat. Bank of Commerce v. Nat. M. B. Assn.*, 55 N. Y. 211; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *F. & M. Bank v. Butchers' Bank*, 16 N. Y. 125; *I. Nat. Bank v. Wetherald*, 36 N. Y. 335; *Crawford v. West Side Bank*, 100 N. Y. 54.) The failure of the plaintiff to notify the defendant of the forgery until late in the evening of June fourteenth should preclude a recovery. (*Nat. Bank v. Nat. Bank*, 50 N. Y. 584; *Knight v. Whiffen*, L. R. [5 Q. B.] 660.)

GRAY, J. This case comes to us upon questions of law, raised by exceptions taken upon the trial. All questions of fact depending upon conflicting testimony, or upon inferences from the evidence adduced, have been forever settled by the unanimous affirmance of the judgment at the Appel-

late Division. It is quite obvious, as well from the nature of the pleadings, as from the course of the trial, that the questions to be decided by the jury related to the negligence of the plaintiff in giving certification to the check, when it was in possession of a letter of advice showing that the check had been raised since its issuance; to its continuing neglect to ascertain the alterations in the check, when received through the clearing house exchanges on the following morning, and, thereupon, to make a reclamation upon the defendant within a reasonable, or the usual, time for so doing, and, lastly, to what justification, if any, the defendant had in paying out to its depositor the moneys represented by his deposit of the certified check. The verdict of the jury must be regarded as establishing all these questions adversely to the plaintiff and we must consider the plaintiff as having been culpably negligent in its course of dealing with the check, which, indeed, was not disputed, and the defendant as having paid out the moneys in good faith, relying upon what the known facts appeared to represent. The right of a bank, certifying a check erroneously, to bring an action to recover back moneys paid upon the certified check, as moneys paid by mistake, as a general proposition, is not questioned. If there was nothing more of the case than that fact, the plaintiff's right of recovery would be undoubted; but its negligence in certifying the check was continued in subsequently accepting and paying it; with the result that, in reliance upon the apparent attitude and the acts of the certifying bank, and in the usual course of business, the defendant parted with the moneys upon the demand of its depositor. Thus, the question becomes one of where, as between the parties, the burden of the loss shall rest. The verdict of the jury having determined the plaintiff to have been the culpably negligent one, the judgment should settle that question; unless some error of a material character has been committed upon the trial.

The principal error which the plaintiff insists upon is to that portion of the charge, in which the trial judge said to the jury that, "the question seems to me to be narrowed

down to a single one, and that is whether the Continental National Bank, at the time that they certified the draft of the Philadelphia Bank drawn upon it, were guilty of culpable negligence in doing so. That appears to be about the question involved in this case. And that is, as I understand, the question as stated by Mr. Justice INGRAHAM in his opinion in this case on appeal." To this observation of the trial judge, the plaintiff excepted and it is argued, in support of the exception, that it enlarged the rule of law with respect to the effect of certification, as it had been established by the decisions, and that the jurors were left to find adversely to the plaintiff, irrespective of whether the defendant had paid out the moneys to its depositor in reliance upon the plaintiff's payment of the certified check. That this expression of opinion by the trial judge could not have prejudiced the plaintiff's case, I entertain no doubt. Upon its face, it was but a personal reflection of the trial judge and not, actually, an instruction to the jury. It was uttered after the jury had been informed as to the nature of the cause of action and of the defense, and after they had been correctly instructed as to the legal effect of the certification of a check, by a citation from the opinion of this court in *Clews v. Bank of New York Nat. Banking Assn.* The observation was followed, immediately, by a reference to the decision of the Appellate Division upon the case, as it had come up from a former trial of the issues. The opinion then rendered in that court was quoted from, in the following language; "It was, at least, a question for the jury to determine whether or not, with the knowledge of the facts which had been communicated to the officers of the plaintiff, it was culpable negligence on their part to receive this draft, as they did, on the morning of June fourteenth, at about half-past ten o'clock, without examination or verification, and to retain it until after two o'clock; and if the jury should find in the affirmative, *and that the defendant made the payment to its depositor relying upon the acceptance and payment of the draft by the plaintiff*, the defendant would be exonerated from liability for anything more than the amount

remaining in its hands to the credit of the fraudulent depositor, when notice of the forgery was given to the defendant." The trial judge added, "That is the rule which I am bound to adopt in this case, because we are all bound by the decision of the Appellate Division of this court." The jury was, thus, distinctly told that, in law, the plaintiff was precluded from recovering back the amount, which it had paid upon the fraudulent check, only, if "the defendant made the payment to its depositor relying upon the acceptance and payment of the draft by the plaintiff." Thereafter, the facts in evidence were reviewed and the rule of law, which the trial judge had announced as controlling in the case, was repeated, in similar language, at the close of the charge. I do not think that we should isolate the particular observation which was objected to, in order to find error. The observation should be considered in connection with the whole of the charge upon the subject and error could only be predicated if, upon such consideration, it was plain that the jury may have been misled as to the scope of their investigation. Standing alone, an inference was, of course, possible from the casual expression of the trial judge as to how the question appeared to him; but the jurors were distinctly, and repeatedly, informed as to what the law obliged them to determine. They were instructed that the defendant's reliance upon the acceptance and payment of the check by the plaintiff was a necessary adjunct to an affirmative finding of culpable negligence in the plaintiff, in order to support a verdict for the defendant. Assuming that the trial judge's remark was incorrect, by itself, it could have had no effect upon the jurors' minds. They were carefully instructed by what considerations they should reach a conclusion upon the relative rights of the parties. Indeed, their attention was directed to the importance of determining at what time the draft was paid by the exchange of checks and they were told that "it makes some difference in this case as to when that took place. * * * The question is, when it was paid." While the certification was an initial fault, which might be regarded as inducing the subsequent careless conduct of plain-

tiff's clerks, it is quite significant that the trial judge did not leave the case with the jury upon the proposition that that fault was sufficient, alone, to charge the plaintiff with the loss. In emphasizing the first act of certifying the check, as the feature, which, under the circumstances, most impressed him, the trial judge did not mislead the jury; because, if that was culpable negligence, the plaintiff had come under a responsibility from which it should, and might, have discharged itself by the exercise of ordinary care. In failing to do so, we have a situation, where the plaintiff's negligence was unbroken and which estops it from raising a question about the insufficiency of certification alone to charge it with the loss.

There is no question but that the liability, or obligation, which a bank assumes in certifying a check drawn upon it, is well settled by decisions of this court, and with such definiteness of expression as to lend to the rule thus settled the greatest weight. (See *Marine National Bank v. National City Bank*, 59 N. Y. 67; *Clews v. Bank of New York Nat. Banking Assn.*, 89 ib. 419.)

In *Marine National Bank v. National City Bank*, the plaintiff sued to recover from the defendant moneys, which were alleged to have been paid by mistake. A check on the former had been altered, as to date, payee and amount, and, on presentation, had been duly certified. It was deposited with the defendant and, on the following morning, its amount was paid by the plaintiff. The depositor with the defendant was unaware of the alterations and, relying upon the certification alone, had given to the person offering the certified check its equivalent in gold. A judgment recovered by the plaintiff was upheld by this court and the doctrine was laid down, in strong language, that the certifying bank was not deemed to warrant otherwise as to the check certified than the genuineness of the drawer's signature and the sufficiency of his credit, and it was said that "there is no ground of reason, or authority, for extending the rule to matters not being especially within the knowledge of the certifying bank." In that case, there was no question of a loss by the defendant. It still had the moneys

and the question was, solely, as to its liability to refund them, for having been paid under a mistake of fact. It had not changed its position.

In *Clews v. Bank of New York Nat. Banking Assn.*, the question discussed in the opinion was as to the liability of the defendant upon a foreign draft, which it had certified and which certification it had, upon the inquiry of a clerk of the plaintiffs, pronounced to be good. At the time of certification, the draft had been altered in date, name of payee and amount. The inquiry was made by the plaintiffs, before taking it in payment for some bonds. It was held, as in the *Marine Bank* case, that the defendant's liability was like that of the acceptor of a draft and its certification "guaranteed the genuineness of the drawer's signature, and represented that it had funds of the drawer in its possession sufficient to meet the check, and it engaged those funds should not be withdrawn from it by the drawer, to the prejudice of any *bona fide* holder of the check; and the certificate did not impose upon the defendant any further or greater responsibility." It was said that "when a check has been raised by some person without authority before certification, the certifying bank cannot be called upon, in consequence of its certification, to pay the amount of the raised check; and when a bank has thus certified a raised check by mistake and subsequently pays the money thereon, *without any culpable negligence on its part*, it can recover the amount thus paid as money paid by mistake." (Citing authorities.) "The certification of a check," it was observed, "never imports that there is money in the bank absolutely applicable to the payment of the amount named in the check. * * * It simply imports that the drawer has money to the amount of the check, which will not be withdrawn, and which will be paid upon the check if it is properly payable thereon." In that case, which had several trials, a judgment, finally, recovered by the plaintiffs was affirmed; because it rested upon a finding by the jury of culpable negligence in the defendant, in having answered the inquiry by the plaintiffs, without

N. Y. Rep.] Opinion of the Court, per GRAY, J.

referring to the information which it possessed. (105 N. Y. 398; 114 ib. 76.)

In the *Marine Bank* case, Judge ALLEN took occasion to remark that if the court had unduly limited the liability of the certifying bank and had denied the potency of the act of certification, which, for the convenience of business transactions, it was thought it should have, the remedy was in the modification of the form of the certificate, so as to express the enlarged obligation contended for.

The rule of law, as laid down in these cases, with respect to the effect of certification, should have no amplification. Indeed, the concession is made by the respondent that certification does not guarantee the genuineness of any portion of the body of the check and that no duty rests upon the certifying bank to make inquiry relative to such genuineness and, upon the request of the plaintiff, the jury was instructed to similar effect. The rule rests upon the plain reason that a certifying bank is bound to know the signature of its depositor and the condition of his account with it; but that it is not bound to know the handwriting of the body of the check. Certification, therefore, within the authorities, as in the case of the acceptance of a bill of exchange, has reference to facts, which are legitimately chargeable to the knowledge of the certifying bank, and not to any other fact about the paper. (Story on Bills, §§ 262, 263; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *National Bank of Commerce in N. Y. v. National Mechanics' Banking Association*, 55 ib. 211; *Marine Nat. Bank v. National City Bank*, *supra*.)

The liability of the plaintiff to bear this loss does not rest upon the mere certification of the draft, it arises by reason of the estoppel, which its continued neglect had worked. When the plaintiff, so tardily, discovered the alterations in the check, it was, then, too late to protect itself, or the defendant, from loss. The money was no longer under the control of the latter. Certification had given to the check a measure of currency, by its guaranty of signature and of funds, and the defendant, in the due and regular course of the banking busi-

ness, having paid out the moneys upon warrantable presumptions of correctness and of payment, the plaintiff should not be heard upon its demand for the repayment of the moneys. The plaintiff was guilty of culpable negligence in certifying the check and in paying and retaining it, thereafter, and, these facts being established, it would be highly inequitable to admit its right to recover. The remark of the trial judge may well be regarded as a justifiable reduction of the facts proved to the proposition stated by him; which, if not correct in law when taken alone, does not constitute reversible error, because of its explanation from the context.

It is, then, urged by the appellant that the court erred in refusing to charge, upon its request, "that under the constitution of the New York Clearing House Association * * * checks presented by one member against another member are not actually paid until three o'clock in the afternoon of the day on which they are delivered at the Clearing House to the bank against which they are drawn," and "that a check or draft presented to the bank on which it is drawn through the New York Clearing House cannot be considered as paid until (1) either the drawee bank has paid into the Clearing House the amount which it owes to the Clearing House as a result of the previous day's transactions, or (2) it has received from the Clearing House the amount due to it as a result of the said transactions." To the first request the trial judge replied that he "declined to charge any further than he had already charged the jury," and he declined the second, "because that was a question of fact for the jury." It is not quite perceptible how the second request has any relevancy, upon the facts of this case. In his charge, the trial judge had instructed the jury that as the two banks "were both members of the Clearing House Association, they were both bound by the rules of the association," and they "might take the rules of the association * * * into consideration in determining as to when the draft was paid in the exchange of checks. * * * The question is when it was paid. The Continental Bank claims that as soon as it

discovered the forgery, which was about four o'clock in the afternoon, it gave all the notice it could give, under the circumstances, to the Tradesmen's Bank." The argument is made that, by refusing to charge the requests, the court submitted the construction of the clearing house rules to the jury and, therefore, erred. I do not think that that was the case. It was a question of fact, upon the evidence, as to whether the defendant was entitled to regard the check as paid. The clearing house rules do establish periods of time at, or within, which the daily exchanges of checks and payments of resultant balances shall be made. The hour for making exchanges is ten o'clock precisely. When the daily exchanges are completed at the clearing house, the banks, which appear as debtors to the clearing house, are obliged to pay the balances against them between twelve-thirty and one-thirty P. M., and balances in their favor are to be paid at one-thirty o'clock, or as soon thereafter as they can be made up. As to reclamations arising upon checks, or drafts, not good for any cause and which are to be made directly between the banks concerned, the clearing house rule simply provides that they "should be made before three o'clock." In this case, both the plaintiff and the defendant were creditors of the clearing house and they were paid. The plaintiff made no reclamation upon the defendant, until between four and five o'clock in the afternoon. According to the testimony of the defendant's clerk, it had been customary to make reclamations between half-past twelve and half-past one o'clock of the day. It was clearly, in my opinion, a question for the jury to say, upon a consideration of the provisions of the rules and of the evidence in the case, whether the defendant was warranted in considering the check as one that had been paid. In the next place, I do not think that the plaintiff is in a position to take this objection, in view of its own negligent conduct. The clearing house rules had no application to the case. The question was one of the good faith of the defendant, in paying out the moneys to its depositor when it did, and that was one purely, of fact upon all the

evidence, which the verdict of the jury has settled. It was not one to be determined by a construction of the rules of the clearing house.

It is further urged by the appellant that the court erred in refusing to charge, at its request, "that the plaintiff owed no duty to the defendant to compare the draft in question with the letter of advice from the Philadelphia National Bank before accepting the same, and, making no representation to the defendant as to the genuineness of the body of the draft, it is not now estopped from showing that the money was paid under a mistake of fact and should be refunded." The trial judge declined to charge in that respect, further than he had referred to the subject-matter in his charge. I think that there was no error in the ruling. What the trial judge had said in the charge had sufficiently covered the subject of the request. It may be true that the plaintiff owed no duty of the kind to the defendant, in particular; but that is not the determining question. The question was whether the plaintiff had been so culpably neglectful of its general duty, after giving the check the currency imparted by its certification, and had been so careless in the matter, as to estop it from recovering in this action. The trial judge had instructed the jury, in effect, that, as the law was settled, the fact of a culpable neglect in certifying the check must be accompanied by the further facts of its acceptance and payment, and of the payment by the defendant to its depositor in reliance thereupon. The estoppel upon the plaintiff was created by its whole negligent conduct, from the first error in certifying the check, to the subsequent errors of its payment and retention.

I think that no material errors were committed upon the trial and that the case was fairly submitted to the jury upon the questions of fact, which it involved.

For the reasons given, the judgment should be affirmed, with costs.

BARTLETT and WERNER, JJ., concur; PARKER, Ch. J., HAIGHT, MARTIN and VANN, JJ., concur in the result and in

N. Y. Rep.]

Statement of case.

the opinion, except in so far as it seems to undertake to define the boundaries of certification of checks, and as to all that is said in that direction no opinion is expressed, it not being deemed necessary.

Judgment affirmed. _____

In the Matter of the Accounting of ORSON W. SHELDON, as
Assignee of J. MELVIN ADAMS, Appellant.

ALBERT U. SHELDON, Appellant; ARTHUR WALLACE et al.,
Respondents.

ASSIGNMENT FOR CREDITORS — (L. 1877, CH. 466) — WHEN ASSIGNEE'S SALE MAY BE SET ASIDE UPON SUMMARY APPLICATION. Under the General Assignment Act (L. 1877, ch. 466, as amd.) the conversion, disposition and distribution of an assigned estate is, from its inception, a proceeding in court, and the administration of the estate, though made by the assignee who, in the first instance at least, is selected by the assignor, is really made by the court; a purchaser at an assignee's sale, therefore, makes himself a party to the proceeding and subjects himself to the jurisdiction of the court, which, in a proper case, without action brought, has power upon a summary application in the proceeding to set the sale aside and vacate it.

Matter of Sheldon, 72 App. Div. 625, affirmed.

(Argued November 10, 1902; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 31, 1902, which affirmed an order of the Washington County Court removing the assignee herein, settling his accounts and setting aside a sale made by him to Albert U. Sheldon of certain of the assigned property.

The facts, so far as material, are stated in the opinion.

C. H. Sturges for Orson W. Sheldon, appellant. There was no power in the County Court to set aside the sales in these proceedings. (*Fisher v. Hersey*, 78 N. Y. 387; *Matter of Rider*, 23 Hun, 91.)

Willoughby L. Sawyer for Albert U. Sheldon, appellant. The decree of the County Court setting aside and vacating the sales made to appellant is irregular and void. (*Matter of*

Rider, 23 Hun, 91; *Matter of Lewis*, 81 N. Y. 421.) Inadequacy of price afforded the County Court no power to set aside the sales. (*Jarger v. Kelly*, 52 N. Y. 274.)

Edgar T. Brackett, *F. I. Baker* and *Edgar Hull* for respondents. Where a sale has been improperly made by a trustee the court will order a resale. (*Davoue v. Fanning*, 2 Johns. Ch. 252.) The County Court may exercise not only specific statutory power, but also the power of a court of equity, providing it is in reference to the trust and any matters involved therein. (*Matter of Holbrook*, 99 N. Y. 539.) Under section 25 of the Assignment Act, the county judge is given equitable powers which are ample to enable him to set aside a sale of the assigned assets. The appellant Albert U. Sheldon, by dealing with the assignee, became a party to the assignment and could be compelled, on motion, to restore what he had wrongfully taken from the estate. (*Matter of Morgan*, 99 N. Y. 145; *Matter of Willse v. Traver*, 5 Misc. Rep. 105.)

CULLEN, J. The propriety of the removal of the appellant assignee and that part of the decree of the County Court which settled his accounts, including the sums charged against him as upon a devastavit, and the refusal of the court to allow him certain credit claimed by him, present solely questions of fact. There is evidence to sustain all the findings made by the County Court and we have no power to review those findings unless they have been made without evidence. The appeal of the assignee requires no further discussion.

The serious question involved in the case is the power of the County Court to set aside the sale made by the assignee of a portion of the assigned estate to his son, the appellant, Albert U. Sheldon. If there was power in the court to set aside the sale, the facts disclosed by the evidence warranted the order. The appellant at the time of his purchase was acting as clerk of the assignee. He was conversant with all the facts bearing on the value of the property, information which outside bidders did not have. The money to make the pur-

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

chase was advanced by the assignee. The relation of the appellant to the trust was such that had an action been brought in a court of equity the case would have warranted a judgment setting aside the sale. But that view does not dispose of this appeal, and the question remains whether the County Court had power on summary application in the assignment proceedings and without action brought to grant such relief.

The power to make an assignment for the benefit of creditors is not the creation of the statute but existed at common law. (*Thrasher v. Bentley*, 1 Abb. N. C. 39, Ct. of App.) So undoubtedly the title of the assignee and his power to sell and dispose of the assigned estate spring originally from the voluntary act of the debtor as owner of the property at the time. So true is this that it was held in *Jessup v. Hulse* (21 N. Y. 168): "He (the assignor) having consented to part with his title only upon certain conditions, the transfer and the condition must stand or fall together. If, therefore, the court upholds the assignment, it must of necessity protect and enforce the terms and conditions upon which it is made. * * * If he annex an improper condition, the court must pronounce the assignment itself void. It cannot hold the transfer good and disregard the condition; because that would be to take the property from the assignor against his will." Therefore, if there were no statutory regulations on the subject of general assignments it may be conceded that a sale made by the assignee proceeding solely from the authority conferred upon him by his assignor would be in no sense a judicial sale, but present only the ordinary case of a sale made by a trustee. Such a sale if made in bad faith could be avoided, but only in an action in equity brought for the purpose. General assignments, however, have been for many years in this state the subject of statutory regulations. Chapter 348 of the Laws of 1860 and its amendment vested in the judges certain limited powers over assignments. By this act jurisdiction was conferred over the accounting of an assignee rather than any general control of his administration of the assigned estate. The scope of the present statute, the General

Assignment Act of 1877 (Chap. 466), is very much greater. Section 25 provides: "Any proceeding under this act shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein." Since the enactment of this law, though a general assignment still proceeds from the voluntary act of the assignor, the administration of the trust and the powers of the assignee become subject to the supervision and control of the courts. Such being the only kind of assignment that the law permits, the assignor, by making an assignment, elects to subject the trust and its administration to such control as the law imposed. In 1884 (Chap. 328) the General Assignment Act was amended so as to provide that in all assignments made in pursuance of the act the wages or salaries due the employees of the assignor should be preferred before any other debts. In *Richardson v. Thurber* (104 N. Y. 606) a general assignment was made which did not contain that preference. It was contended the assignment was void as in contravention of the provision of law cited. This court, however, upheld the assignment, writing into it the statutory provision for a preference of employees. Judge FINCH there said: "It is argued that an assignment is a private contract creating a private trust fund and the assignee derives all his property from the instrument; that where the assignor does not prefer employees, if the statute does it, and compels the assignee to pay, the legislature stands in the attitude of appropriating the assignor's property against his will and in violation of his express intentions. But the difficulty is imaginary. No one doubts the power of the legislature to regulate and control general assignments for the benefit of creditors. It may per-

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

mit them to be made as it has already done, only upon expressed conditions, and when it does so he who makes an assignment by the act accepts and consents to the conditions." In *Matter of Morgan* (99 N. Y. 145) the assignee had erroneously paid certain creditors. On his final accounting a decree was made that such creditors repay the amounts received by them. It was objected that the court had no power in that proceeding to order the repayment and that the remedy, if any, was by action. The objection was overruled and it was held that the creditors by accepting payment of their claims and dealing with the assignee became parties to the assignment and subjected themselves to the summary jurisdiction of the court. In *Matter of Underhill* (117 N. Y. 471) there came before this court a decree of the surrogate which directed certain legatees to restore overpayments made to them by the executor. It was held that the Surrogate's Court did not possess that power. The case of *Morgan* (*supra*) was relied upon as an authority for the jurisdiction, but this court pointed out that the powers conferred by the General Assignment Act upon the County Court are greater and more general than that conferred upon the Surrogate's Court in reference to the administration of estates. I think that in the light of these decisions it must be considered that under the present law the conversion, disposition and distribution of an assigned estate constitute from the recording of the assignment a proceeding in court and that the administration of the estate, though made by the assignee who, in the first instance at least, is selected by the assignor, is really made by the court under the power granted it by statute to control such administration. If this be the correct view, then by buying at an assignee's sale the same as by purchasing at a receiver's sale, the purchaser makes himself a party to the proceeding and subjects himself to the jurisdiction of the court.

The orders appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Orders affirmed.

CHRISTOPHER J. BANTA, Respondent, v. THOMAS B. MERCHANT,
Appellant.

PARTITION — INSUFFICIENT RESERVATION OF GROWING CROP BY REFEREE AT THE SALE. Evidence that the referee in a partition sale stated "that there would be a claim against the place of about 28 acres of rye, besides that the one that put in the rye was to take his; he furnished all the seed and was to take his share of the seed out of the other half," is not sufficient to establish a reservation of the rye from the sale; at the most it was a statement that the purchaser would take title to the rye, subject to some claim, and in an action for conversion, the submission to the jury of the question whether such reservation was made is reversible error.

Banta v. Merchant, 45 App. Div. 141, reversed.

(Argued December 2, 1902; decided January 20, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1899, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

T. B. Merchant and *L. M. Merchant* for appellant. Defendant became the owner of the land sold under the judgment in partition and entitled to the crops growing thereon at the time of the sale. (*Lane v. King*, 8 Wend. 584; *Gardner v. Finley*, 19 Barb. 317; *Shepard v. Philbrick*, 2 Den. 174; *Austin v. Sawyer*, 9 Cow. 40; *Wintermute v. Light*, 46 Barb. 278; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Batterman v. Albright*, 122 N. Y. 484; *Harris v. Frink*, 49 N. Y. 24; *De Mott v. Hagerman*, 8 Cow. 220; *Green v. Armstrong*, 1 Den. 554.) Plaintiff could not acquire title to this rye by a declaration made at the sale under the judgment in the partition action, to the effect that the sale was subject to some right acquired by him from one tenant in common of the premises. (*Matter of Fales*, 33 App. Div. 611; *Matter*

N. Y. Rep.] Opinion of the Court, per WERNER, J.

of *Gantz*, 85 N. Y. 536; *Matter of Pennie*, 108 N. Y. 364; *Boynnton v. Braley*, 54 Vt. 92; *T. & S. L. Ry. Co. v. Rust*, 19 Fed. Rep. 239.)

Israel T. Deyo for respondent. Plaintiff and the owner of the farm were tenants in common of the entire crop of rye as a chattel up to the time of the sale. (*Harris v. Frink*, 43 N. Y. 24; *Osborne v. Schenck*, 83 N. Y. 201; *Stahl v. Wilber*, 77 N. Y. 158; *Harris v. Gregg*, 17 App. Div. 210; *Thomas v. Williams*, 32 Hun, 257; *Green v. Armstrong*, 1 Den. 550; *Rice on Real Prop.* § 142.) Plaintiff's interest in the growing crop was reserved at the sale, and the referee had full power to make such reservation. (Code Civ. Pro. § 1678; *Valentine v. McCue*, 26 Hun, 456; *Smith v. Brittain*, 42 Am. Dec. 175.) Plaintiff's interest in the growing crop having been reserved continued to maintain its character as personal property and did not pass with the land, and defendant acquired no title to such interest, either on the sale or by the deed. (1 *Hilliard on Real Prop.* 12; *Sexton v. Breese*, 135 N. Y. 387; *Austin v. Sawyer*, 9 Cow. 39; *Sherman v. Willett*, 42 N. Y. 146; *Backenstoss v. Stahler*, 33 Penn. St. 251; *Story v. Hamilton*, 20 Hun, 133; *Leonard v. Clough*, 133 N. Y. 292; *Sayles v. N. W. P. Co.*, 41 N. Y. S. R. 856; 141 N. Y. 603; *Tyson v. Post*, 108 N. Y. 217, 221; *Porter v. T. Nat. Bank*, 70 Hun, 53; 143 N. Y. 668; *Friedrich v. Brewster*, 26 Hun, 236.)

WERNER, J. The action is in conversion. The property alleged to have been converted was the undivided one-half of a growing crop of rye. The controversy arises out of the following facts: On March 28th, 1895, one Burdick and one Ricks, brother and sister, were the owners as tenants in common of a farm in Broome county. On that day an action for the partition of the farm was commenced by Burdick in which his wife, his said sister and a mortgagee were named as defendants. On the following day notice of the pendency of the action was duly filed and properly indexed against the

defendant Ricks, who was the sole occupant of the farm during the year 1895, and until March 31st, 1896, on which date it was sold at public sale pursuant to a decree in the partition action. About October 1st, 1895, Ricks made an arrangement with the plaintiff herein, under which the latter sowed about thirty acres of the farm with rye and the crop was to be divided between them. At the time of the sale of the farm under the decree in the partition action the rye was in the ground. The defendant was the purchaser of the premises at the sale, and, when the crop of rye matured, he harvested it, claiming to be the owner thereof under his title to the farm.

The plaintiff herein claims that his right to an undivided one-half of the rye was expressly reserved at the sale. After the defendant had refused to permit plaintiff to harvest the rye and take one-half thereof this action was commenced. There is some conflict of testimony as to what took place at the sale. The referee who conducted it, and the attorney for Ricks, testified that after the terms of sale had been read by the referee, Ricks' attorney announced "that the premises would be sold subject to the right of the person who had put the rye that was growing upon the farm in upon shares." A bystander at the sale asked how many acres of rye there was, and this question was answered by Mr. Ricks, the husband of one of the owners of the farm. Both of the witnesses testified that it was their best recollection that the statement as to the reservation of an interest in the crop was not made or repeated by the referee. Burdick, the plaintiff in the partition action, testified that "Mr. Hays (the referee) said there would be a claim against the place of about 28 acres of rye, besides that the one that put in the rye was to take his; he furnished all the seed and was to take his share of the seed out of the other half. Both Mr. Hays and Mr. Van Cleve (Ricks' attorney) made the announcement." The defendant admits that Van Cleve announced that the premises would be sold subject to any rights which the plaintiff or any other person might have in the rye, but he denies that any such announcement was made by the referee.

At the close of the plaintiff's case in chief the defendant moved for a nonsuit "on the ground that a cause of action has not been proven." This motion was denied, and the defendant excepted. At the close of the whole case the defendant moved for the direction of a verdict in his favor "on the ground that, under the evidence as it stands, the title to the rye by virtue of the record, *lis pendens* and judgment and sale, vests in Mr. Merchant and, therefore, the plaintiff cannot recover." This motion was also denied and defendant excepted. The learned trial judge in submitting the case to the jury charged them that if the referee sold the farm, reserving the interest of the plaintiff in the crop of rye, then the plaintiff is entitled to recover, but if the announcement of such reservation was not made by the referee and was only made by Van Cleve, the attorney for Mrs. Ricks, then their verdict would have to be for the defendant.

At the conclusion of the charge the defendant excepted to the court's submission to the jury of the question whether the sale was made under this reservation. Defendant further excepted to the charge that if the referee announced such reservation the plaintiff was entitled to recover, and the court was asked to charge, as matter of law, that the interest of the plaintiff in the crop of rye could not have been reserved at the sale. Under this charge the plaintiff had a verdict, and we must, therefore, assume for the purposes of this review that the jury found that whatever announcement was made at the sale as to the reservation of an interest in the rye was made by the referee.

The conditions of sale, interlocutory judgment, referee's report of sale, order of confirmation and referee's deed herein contained no reference to, or reservation of, plaintiff's interest in the rye.

By the agreement between the plaintiff and Mrs. Ricks, the former became a tenant in common with the latter in the crop of rye (*Harris v. Frink*, 49 N. Y. 24, 27; *DeMott v. Hagerman*, 8 Cow. 220), and if it had been harvested before the partition sale took place, no question could have arisen as

to the plaintiff's right to the share claimed. But, owing to the peculiar nature and legal character of growing crops, the plaintiff's title to any share in the rye would be lost by the sale of the land under circumstances which would vest in the purchaser a paramount title. This would have been the result under a sale in foreclosure (*Batterman v. Albright*, 122 N. Y. 484; *Lane v. King*, 8 Wend. 584; *Shepard v. Philbrick*, 2 Denio, 174), and a sale in partition must have the same effect. The reason for the rule rests upon the principle that growing crops form part of the real estate and pass by a conveyance thereof, unless a constructive severance of the crops has been made. (*Harris v. Frink*, 49 N. Y. 27; *Batterman v. Albright*, *supra*; *Sexton v. Breese*, 135 N. Y. 387, 391.)

It is claimed by the respondent that such a constructive severance was effected in this case by the referee's announcement at the sale that there was a claim against the crop of rye. If this announcement had been sufficient to constitute a valid reservation of the crop of rye, the respondent's contention would be well founded and, under the case of *Sherman v. Willett* (42 N. Y. 146), the judgment appealed from would have to be affirmed. The fact that the plaintiff's right to the rye was derived from only one of the tenants in common of the farm would not affect this rule, as his title thereto would be good as against all persons except Burdick, the other tenant in common of the farm, and those claiming under him. If the plaintiff is right in his contention that there was a valid reservation of the rye at the sale, the defendant cannot claim title to the rye either through Burdick or his cotenant, Mrs. Ricks, because he purchased only the land.

This brings us to the main question in the case, which is, whether the statement made at the sale by the referee, as testified to by Burdick, was sufficient to constitute a reservation of plaintiff's interest in the rye. We think not. The statement of the referee, above quoted, was at most a notice that there was a claim against the rye, of some indefinite character and extent, subject to which the premises would be

N. Y. Rep.]

Statement of case.

sold. There was no explicit statement that the rye was withdrawn from the sale, or in any way reserved. The announcement that there was a claim against the rye simply put the purchaser upon notice that he took the rye under circumstances which might render him liable to a lawsuit. This clearly was not the equivalent of a statement that the rye was withdrawn from the sale or that the purchaser would not take it. It was at most a statement that the purchaser would take title to the rye, but subject to some claim. We think, therefore, that the evidence was insufficient to establish a reservation of the rye at the sale by the referee, and that the learned trial court erred in submitting to the jury the question whether such a reservation had been made.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN and CULLEN, JJ., concur.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TOWN OF WALTON, Appellant, v. THE BOARD OF SUPERVISORS OF DELAWARE COUNTY, Respondent.

MANDAMUS—ENFORCEMENT OF JUDGMENT REQUIRING BOARD OF SUPERVISORS TO LEVY TAX AND PAY OVER PROCEEDS TO COUNTY TREASURER TO BE INVESTED FOR A TOWN. A judgment directing the board of supervisors of Delaware county (1) to levy and collect from the taxable property of the county the sum of \$2,019.16, with interest; (2) to deposit the sum with the county treasurer for the benefit of the town of Walton, the same to be invested by him in pursuance of the provisions of chapter 907 of the Laws of 1869, as amended; (3) that upon the receipt of the money the county treasurer invest the same for the benefit of the said town, in accordance with the law, and to keep the same invested, is not complied with by merely levying and collecting the sum specified, and without giving any directions for the use of the money as a sinking fund for the benefit of the town, either in the warrant for the collection of taxes or in any other way, paying it over to the county treasurer, so that it became intermingled with the general fund and was used for county expenses; and the town may enforce the judgment by a writ of peremp-

tory mandamus to compel the board of supervisors to again levy and collect the sum and pay it over to the county treasurer for the benefit of the town.

People ex rel. Town of Walton v. Bd. of Suprs., 75 App. Div. 184, reversed.

(Argued January 5, 1903; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 22, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to raise and set apart for the benefit of the relator a certain sum alleged to be unpaid upon a judgment previously recovered by the relator against the said defendant.

The facts, so far as material, are stated in the opinion.

E. H. Hanford for appellant. The contention that the audit of the judgment by the board of supervisors, the including of the amount audited in the general tax levy and the receipt of the tax by the county treasurer in ordinary course of law constituted full performance by the defendant of the requirements of this judgment cannot be sustained. (1 R. S. 419, § 5; *Gray v. Bd. of Suprs.*, 93 N. Y. 603; *Vil. of Port Richmond v. County of Richmond*, 11 App. Div. 217; *Strough v. Bd. of Suprs.*, 119 N. Y. 218; *Clark v. Sheldon*, 134 N. Y. 333; *Cluff v. Day*, 124 N. Y. 195; *Estate of Hood*, 98 N. Y. 363; *Johnson v. Lawrence*, 95 N. Y. 154; *Laytin v. Davidson*, 95 N. Y. 263; *Winne v. N. F. Ins. Co.*, 91 N. Y. 185; *Ruggles v. Ins. Co.*, 114 N. Y. 415.) The remedy by mandamus is proper. (*Buck v. City of Lockport*, 6 Lans. 251; *People ex rel. v. Mayor, etc.*, 10 Wend. 393; *McCullough v. Mayor, etc.*, 23 Wend. 458; *People ex rel. v. Green*, 58 N. Y. 295.)

Edwin D. Wagner and *George A. Fisher* for respondent. The relator, if it has a valid claim against the county of Delaware, has a perfect remedy by action, and, therefore, a motion for a writ of mandamus should be denied. The writ of mandamus will not be awarded where there is a remedy by action. (*Ex parte F. Ins. Co.*, 6 Hill, 243; *Shepley v.*

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

Mechanics' Bank, 10 Johns. 484; *People ex rel. v. Coal Co.*, 10 How. Pr. 543; *People ex rel. v. Campbell*, 72 N. Y. 496; *People ex rel. v. Crennan*, 141 N. Y. 239; *People v. Chenango Co.*, 11 N. Y. 563; *People v. Hawkins*, 46 N. Y. 9.) The claim is disputed and its validity controverted, and in such a case the motion for a mandamus should be denied. (*Mott v. Greene County*, 64 N. Y. 600; *People ex rel. v. Coler*, 171 N. Y. 373.) When the board of supervisors on the 18th day of November, 1893, by resolution directed that the amount of the judgment be levied on the county they did all that by law or by the judgment they were required to do. (*Craft v. Merrill*, 14 N. Y. 456; *Benton v. Hatch*, 122 N. Y. 322; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Baird v. Mulliken*, 68 Ind. 231; *Ten Eyck v. Craig*, 62 N. Y. 406; *Gray v. Bd. of Suprs.*, 93 N. Y. 603.) The writ of mandamus will not be issued where there is doubt as to the right of the claimant. (*People v. Vil. of West Troy*, 25 Hun, 179; *People ex rel. v. Board of Police*, 107 N. Y. 235; 46 Hun, 296; *People ex rel. v. Stupp*, 49 Hun, 544; *People ex rel. v. N. Y. I. Asylum*, 122 N. Y. 190; *People ex rel. v. Coler*, 58 App. Div. 131; *People ex rel. v. Greene County*, 64 N. Y. 600; *People ex rel. v. Wendell*, 71 N. Y. 171.) The relator's remedy by mandamus is barred by the Statute of Limitations. (*People v. Beach*, 3 Civ. Pro. Rep. 180; *People v. French*, 31 Hun, 617; *Butler v. Johnson*, 111 N. Y. 204; *Diefenthaler v. Mayor, etc.*, 111 N. Y. 338; *Mason v. Henry*, 152 N. Y. 529; *Matter of Rogers*, 153 N. Y. 316; Code Civ. Pro. § 382; *Matter of Neilley*, 95 N. Y. 390; *Roberts v. Ely*, 113 N. Y. 128.)

O'BRIEN, J. The order from which this appeal was taken affirmed an order of the Special Term which denied a motion made in behalf of the relator for a peremptory writ of mandamus to compel the defendant to levy and collect from the taxable property of the county the amount of a certain claim which the relator sought to enforce. The order of affirmance

states that it was not made in the exercise of discretion, but for want of power on account of certain legal objections raised, and that except for these legal objections the application for the writ should have been granted. Hence, all questions of fact and all considerations based upon the exercise of discretion have been eliminated from the case and the appeal presents a pure question of law, namely, the power of the court to grant the application. There is not the slightest dispute, however, about the facts; they are all admitted or conclusively established.

It appears that many years ago the relator, The Town of Walton, issued its bonds in aid of a railroad under chapter 907 of the Laws of 1869. That statute provided that all general taxes imposed upon the railroad in the town should be set aside and invested as a sinking fund for the benefit of the town, to be used for the redemption of the bonds so issued. The board of supervisors levied the taxes in every year and collected them from the railroad, and they were paid into the county treasury and disbursed for the benefit of the county in payment of its current expenses, and so the command of the statute was disregarded. The town brought an action against the board of supervisors for the misappropriation, and on the 10th of November, 1893, it recovered a judgment which required the defendant in the action to do certain specified things in order to make good to the town whatever it had lost. The board was commanded (1) at its next annual meeting or session to levy and collect from the taxable property of the county the sum of \$2,019.16, with interest from December 1st, 1892, to the time of the deposit of the same with the county treasurer, as thereafter provided. (2) That the defendant deposit the sum with the county treasurer for the benefit of the town of Walton, the same to be invested by him in pursuance of the provisions of chapter 907 of the Laws of 1869, and the acts amendatory thereof and supplementary thereto. (3) That upon receipt of that money the county treasurer invest the same for the benefit of the said town in accordance with the law, and to keep the same invested.

It was to enforce this judgment that the relator applied for the writ, and the answer to the application presenting the legal objection referred to was that the board had paid the judgment, or at least paid and performed the mandate of the court, as required. There is no dispute about the facts which it is claimed constituted the payment or performance. On the 18th of November, 1893, the board passed a resolution in substance as follows: That the sum of \$2,694.71 allowed to the town of Walton by the committee on railroad rebates be levied on the county and paid as follows: \$2,534.15 to be paid to the county treasurer as a sinking fund as provided by law for the benefit of the town of Walton and the sum of \$160.56 to be paid to its attorneys as their fees allowed by the referee in the action. That is all that was ever done by the board so far as the record discloses to pay or to perform the commands of the judgment. The money was collected and paid into the county treasury and paid out by the treasurer for the current expenses of the county just as it had been paid out before the judgment was recovered at all. There is no claim that the treasurer was a defaulter, or that the money was used by any one otherwise than for the benefit of the county, nor does it appear that any copy of the judgment was ever given to the treasurer, or that he knew that it existed, or that the board in the warrants for the collection of the taxes, or in any other way, gave any directions for the use of any of the money as a sinking fund for the benefit of the town of Walton. Moreover, it appears that all the money levied and collected in that year was paid out by the county treasurer in various ways for the county on or before the second day of May, 1894, and that the treasurer was compelled to and did borrow from time to time upon the credit of the county sufficient additional money to meet the current expenses of the county until taxes were collected in the following year. The board in the year 1893 had authorized the county treasurer to borrow any additional sums of money necessary to defray the county expenses for that year not exceeding fifteen thousand dollars.

The defendant obeyed the first clause of the judgment; that is to say, it levied and collected from the taxable property of the county the sum specified, but it did not deposit any money with the county treasurer for the benefit of the town to be invested by him. In order to execute properly that part of the judgment the board was required to do something more than cause the item to be inserted in the budget for that year. It should have separated the sum embraced in that item from the other moneys and should not have allowed it to be intermingled with the general fund. It could have given directions for that purpose to the county treasurer either in the warrants for the collection of the taxes, or by delivering to him a copy of the judgment, or in some other way. So far as the county treasurer was concerned, it does not appear that he had any authority or directions from any source to create a sinking fund for the benefit of the town of Walton. The board did nothing more after the judgment was rendered than it had done before. It levied and collected the taxes, and if that is a sufficient answer to this application it ought to have been a good defense against the action which resulted in the judgment. The money which the board directed to be levied and collected was subject to its direction and control, and, since it gave no directions in any form whatever for the creation of a sinking fund for the benefit of the town of Walton, it neglected to carry out the mandate of the judgment. When the money levied by the board came into the hands of the county treasurer he had no directions, and, so far as it appears, no authority to constitute a sinking fund for any particular town. He in effect placed all the money to the credit of the county and paid it out for county expenses. It is quite manifest, therefore, that, in view of these conceded facts, the defendant has neither paid nor executed in any way the judgment in question. The county, so to speak, collected the money with one hand and paid it out with the other, and to say that its obligations to the town of Walton have thus been discharged would be quite absurd.

The learned counsel for the defendant upon the argument

N. Y. Rep.]

Statement of case.

in this court submitted several objections of a somewhat technical character in answer to the relator's application. It is said that this is a disputed or contested claim, and, therefore, cannot be enforced by the writ of mandamus. The claim of the town is represented by a judgment. There is no dispute with respect to the validity of that judgment, and the only defense is that in some way it has been satisfied or canceled. The only method for the enforcement of a judgment recovered against a board of supervisors is by the writ of mandamus. It is quite clear that, upon the facts disclosed by this record, the relator could not bring an action upon this judgment, and even if he could multiply judgments in that way, in the end they would have to be enforced by mandamus. Nor is the objection that the relator's judgment is barred by the Statute of Limitations at all tenable. This is a proceeding to enforce a judgment recovered in the year 1893, and no Statute of Limitations constitutes any obstacle to the relief which the relator applied for. We think that the relator was, as matter of law, entitled to the writ, and, therefore, the order appealed from should be reversed and the application for the writ granted, with costs in all courts to the relator.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN and CULLEN, JJ., concur.

Order reversed, etc.

THOMAS F. MALONEY, Appellant, v. THE IROQUOIS BREWING COMPANY et al., Respondents.

1. CONTRACT—TRIPARTITE AGREEMENT FOR SALE OF SALOON—WHEN "RECEIVE" SHOULD BE CONSTRUED AS "COLLECT." Where it appears that under a tripartite agreement providing for the sale of a saloon, a brewing company agreed to pay the purchase price in consideration that all the beer sold in the conduct of the business should be of its manufacture, and in addition to the regular price of the beer sold the vendee should pay to it the sum of two dollars per barrel until the purchase price was paid, that the brewing company agreed to receive the money, and when the sum of \$1,200 had been received it would pay over to the vendor the whole purchase price of the saloon, it is the duty of the brewing company to collect the additional two dollars per barrel upon

all beer delivered at the saloon and apply the same for the benefit of the vendor, since the word "receive" must be construed as synonymous with the word "collect" and not as indicating that the brewing company was to become a mere custodian of the money and not liable to account to the vendor until the stipulated sum was in its possession.

2. **NOMINAL CHANGE IN OWNERSHIP OR CONDUCT OF BUSINESS DOES NOT AFFECT THE RIGHTS OF THE VENDOR.** The fact that, after the execution of the agreement, the vendee's wife continued the saloon business under a lease of the premises in her own name, does not release the brewing company from liability to the vendor, where it appears that the business was conducted by the vendee either for himself or his wife, and was a mere nominal, not a real or substantial, change in the ownership of the property or in the conduct of the business, and the company continues to enjoy the right to supply the saloon with all the beer used in the conduct of the business.

Maloney v. Iroquois Brewing Co., 63 App. Div. 451, reversed.

(Argued December 3, 1902; decided January 20, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 9, 1901, affirming a judgment in favor of defendants entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Simon Fleischmann, Harry L. Taylor and Eugene L. Falk for appellant. Under the agreement between the parties the Iroquois Brewing Company was obliged to collect two dollars a barrel, in addition to the regular price, on all beer sold by it to Mallon, and plaintiff cannot be prejudiced by the failure of the brewing company so to collect said excess. (*Baldwin v. Humphrey*, 44 N. Y. 609; *Barton v. McLean*, 5 Hill, 256; *Wain v. Warlters*, 5 East, 10; *St. L. & D., L. & M. Co. v. Tierney*, 5 Col. 582; *Butler v. Thompson*, 92 U. S. 412; 158 U. S. 356; *Rogers v. Kneeland*, 10 Wend. 218; *Jugla v. Trouttet*, 120 N. Y. 21; Anson on Cont. [2d Am. ed.] 330; *Jones v. Kent*, 80 N. Y. 585; *Gillet v. Bank of America*, 160 N. Y. 549; *Robertson v. E. O. Co.*, 146 N. Y. 20.) The practical construction of the contract by the parties shows that it was their intention

N. Y. Rep.]

Points of counsel.

that the brewing company should collect two dollars a barrel in excess of the regular price of all beer to be sold by the brewing company to Mallon. (*Ins. Co. v. Dutcher*, 95 U. S. 269; *Woolsey v. Funke*, 121 N. Y. 87; *Mayor, etc., v. N. Y. R. C. Co.*, 8 Misc. Rep. 61; *Stokes v. Recknagel*, 6 J. & S. 368.) The conclusions of law of the referee and the judgment based thereon are wholly unwarranted by the findings of fact or the evidence in the case. (*Gillet v. Bank of America*, 160 N. Y. 549.)

James O. Moore and *Robert F. Schilling* for respondents. The terms of the tripartite contract are plain and explicit; there is no ambiguity nor lack of definiteness in the instrument; it is concise, clear and free from doubt and the obligations and intention of the parties can be readily ascertained from its context. (*Duchnes v. Heyman*, 2 App. Div. 354; *Gillet v. Bank of America*, 160 N. Y. 549.) The reasonable intention of the parties to a contract is to be sought in the words of such contract, not assumed; and it is not the duty of the court to bend the meaning of some of the words of a contract into harmony with a supposed reasonable intention. (*Crump v. McC. C. Co.*, 34 U. S. App. 598; *Benjamin v. McConnell*, 9 Ill. 536; *McConnell v. City of New Orleans*, 35 La. Ann. 273; *Hall v. F. Nat. Bank*, 53 Md. 120; *Schoonmaker v. Hoyt*, 140 N. Y. 431; *C. St. Ry. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 56; *Beach on Mod. Law of Cont.* ¶¶ 703, 704; *Wadsworth v. Smith*, 43 Iowa, 439; *Herple v. Reinhart*, 100 Iowa, 530; *McClusky v. Cromwell*, 11 N. Y. 593; *Johnson v. H. R. R. Co.*, 49 N. Y. 455.) The liability of this respondent to appellant does not become complete until the brewery has received from Mallon \$1,200, composed of payments of \$2 per barrel, in addition to the regular price, for beer purchased by him from the company. (*B. H. Co. v. W. A. W. M. & R. M. Co.*, 152 N. Y. 547; *Gillings v. McLaughlin*, 18 Misc. Rep. 58; *Russell v. Allerton*, 108 N. Y. 292.) Where the language of a written instrument is clear and unambiguous, the acts of the parties cannot be considered in

respect to its construction. (*Giles v. Comstock*, 4 N. Y. 270; *Hill v. Priestly*, 52 N. Y. 635; *Norton v. Woodruff*, 2 N. Y. 155; *Albright v. Voorhies*, 36 Hun, 444; *Davis v. Schafer*, 50 Fed. Rep. 764; *Russel v. Young*, 94 Fed. Rep. 45; *Rouss v. Cuglow*, 103 Iowa, 60; *Crass v. Scruggs*, 115 Ala. 258; *L. Ry. Co. v. L. S. R. Co.*, 100 Ky. 690.) The transactions between the parties to this contract do not amount to a novation. (*Cuxon v. Chardley*, 3 B. & C. 591.) There can be no equitable estoppel where one party did not intend to mislead, and the other party was not actually misled. (*Jeroett v. Miller*, 10 N. Y. 402; *Maloney v. Horan*, 12 Abb. [N. C.] 289; *McSwegan v. P. Ry. Co.*, 7 App. Div. 301; *Carpenter v. Cummings*, 40 N. H. 158.) The defendant was bound by the contract only to the extent of its promise. (*B. H. Co. v. W. A. W. M. & R. M. Co.*, 152 N. Y. 547; *C. E. S. Co. v. A. T. Co.*, 161 N. Y. 605.) To entitle plaintiff to recover it was incumbent upon him to show that the Iroquois Brewing Company actually received from Mallon \$2 per barrel in excess of the regular price of beer to the amount at least of \$1,200. (*Lorillard v. Silver*, 36 N. Y. 577; *Murray v. Baker*, 6 Hun, 264; *Hand v. Pennock*, 18 Misc. Rep. 570; *Blodgett v. Hall*, 11 Misc. Rep. 626; *Cartledge v. West*, 2 Den. 377; *Bagley v. Cohen*, 50 Pac. Rep. 4; *Brown v. Dutton*, 9 Cush. 209.)

O'BRIEN, J. The relief which the plaintiff sought in this action was an accounting between himself and the defendants under a tripartite agreement between them, the substance of which will be hereafter referred to. The case was tried before a referee, who reported in favor of the defendants and the learned court below has affirmed the judgment. There is little, if any, dispute about the facts and hence the question is whether the legal conclusions of the referee upon the facts found were warranted.

The learned referee found that on the 17th day of July, 1896, the plaintiff, as party of the first part, one Mallon, as party of the second part, and the Iroquois Brewing Company

as party of the third part, entered into a tripartite agreement concerning the sale of a saloon. The instrument commences with some recitals that are important in ascertaining the intention of the parties and the scope and meaning of the instrument. It is recited that whereas the plaintiff was then conducting the hotel business and was desirous of selling the same, with the good will, furniture and fixtures appertaining thereto, and that as the defendant Mallon was desirous of purchasing the business and property and continuing the same, and they had agreed upon the purchase price to be paid for the same at \$3,000, and whereas the party of the third part, the brewing company, undertakes to pay for Mallon, the party of the second part, to the plaintiff, the party of the first part, the sum of \$3,000, upon the terms, conditions and in the manner and form thereafter set forth, the parties mutually stipulated substantially as follows: (1) The plaintiff was to execute and deliver to Mallon a bill of sale of the good will, furniture and fixtures belonging to or appertaining to the business and Mallon agreed to execute and deliver to the brewing company a chattel mortgage on the same as security for the payment by him to the brewing company of the sum of \$3,000, to be paid as thereafter provided, which mortgage should be a lien upon the property, furniture and fixtures referred to. (2) The method of payment was provided for in the following terms: Mallon agreed that all the beer sold in the conduct of the business should be of the manufacture of the defendant brewing company and that in addition to the regular price of said beer per barrel Mallon should pay to the brewing company the sum of two dollars per barrel, until the whole of the \$3,000 should be paid. (3) That when Mallon should have paid to the brewing company the sum of \$1,200 in that manner, he should thereafter pay to the brewing company upon the balance remaining unpaid semi-annual interest at the rate of five per cent. (4) The brewing company agreed to receive said money and when the sum of \$1,200 should have been received it would pay over to the plaintiff the said sum of \$3,000. The purpose

which was sought to be accomplished by this peculiar agreement is reasonably plain. When the plaintiff sold the business to Mallon he had been all along buying his supply of beer from the brewing company and all the parties intended to continue the supply of beer to the hotel, or saloon, from the same source. To that end the plaintiff and Mallon agreed upon a sale for \$3,000, and the brewing company undertook to pay that sum as expressed in the agreement, and the substance of that was that the latter should be entitled to charge two dollars a barrel extra for the beer and apply the same upon the purchase price, and when \$1,200 should have been received in that way to pay the balance absolutely. The defendant Mallon was to pay to the brewing company interest on the balance remaining unpaid, for the reason, evidently, that it had assumed and agreed to pay Mallon's debt, in consideration of the dealings to take place between them in regard to the purchase and sale of the beer. The bill of sale and chattel mortgage provided for were executed and delivered in accordance with that agreement. This vested the title of the hotel business, furniture and fixtures in Mallon, subject to the mortgage of the brewing company for \$3,000, and the plaintiff was to rely upon the terms of the agreement for the payment of the purchase price. Mallon went into possession of the saloon, carried on the business and procured his supplies from the brewing company as provided in the agreement.

The referee found that the defendant Mallon did not pay to the brewing company the sum of two dollars a barrel upon all the beer purchased by him from the company in addition to the regular price for the same, but did pay to it the sum of \$559.00; that under the terms of the agreement, and down to and including the last day of April, 1898, the brewing company sold to Mallon four hundred and fourteen and seven-eighths barrels of beer; that since the first day of April, 1898, until the time of the trial the business referred to in the agreement had been continued on the same terms by Mallon's wife, under a lease of the hotel to her made about that time;

that the business had been conducted for the wife by her husband and had been carried on continuously in and upon the premises since the making of the agreement to the time of trial by Mallon in his own behalf, or in behalf of his wife, and that from the first day of May, 1898, down to the time of the trial the brewing company sold to the wife four hundred and nine and three-fourths barrels of beer. It is obvious from these findings that the brewing company had sold and delivered to this saloon a sufficient quantity of beer to enable the company, if it collected the two dollars extra per barrel, to reduce the debt to the extent of at least \$1,200. The contention of the defendants is, first, that the brewing company was only to *receive* the two dollars per barrel from Mallon when he paid it, and was not bound to collect it, and as they did not receive the money it is in no manner in default under the agreement. The second proposition is that since Mallon nominally turned over the saloon to his wife, and thereafter conducted the business in her name, all the time purchasing the beer from the brewing company, the latter could not collect the two dollars per barrel after this nominal change or transfer. It will be observed that the learned referee found that the business has been continuously conducted from the beginning by Mallon, either in his own behalf or in behalf of his wife. There is no finding that there ever was any real change of ownership of the property, or of the management in the conduct of the business.

We think that the fair construction of the agreement is that the brewing company was bound to collect the two dollars per barrel upon all beer which it delivered at that saloon and apply the same for the benefit of the plaintiff. That was the method which the parties agreed upon for the payment of the purchase price of the saloon to the extent of \$1,200, and the brewing company could not continue to deliver beer at the saloon and leave it to Mallon to pay the two dollars or not as he might elect. Under the terms of the agreement the brewing company was given the same right to collect the two dollars on each barrel as to collect any part of the purchase price of

the beer. It virtually agreed to charge to Mallon, and he agreed to pay, for the beer two dollars over and above the market price, and to apply what was received on such extra charge for the benefit of the plaintiff. In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion and apparent object of the parties, to determine the meaning and intent of the language employed. Indeed, the great object, and practically the only foundation of rules for the construction of contracts, is to arrive at the intention of the parties. This is a most conspicuous and far-reaching rule, and involves the nature of the instrument, the condition of the parties and the objects which they have in view, and when the intent is thus ascertained it is to be effectuated unless forbidden by law. Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions, without regard to the surrounding circumstances, or the apparent purpose which the parties sought to accomplish. (*Gillet v. Bank of America*, 160 N. Y. 549.) To hold that all the brewing company was bound to do under this agreement was to receive such moneys as Mallon voluntarily elected to pay would defeat the general purpose of the agreement. The company had bound Mallon to buy all his beer from it and to pay the market price for the same and two dollars extra per barrel to apply on the \$3,000 purchase price of the saloon. It could not go on delivering the beer and collecting the market price therefor, leaving the plaintiff to get the two dollars as best he could. Hence, it follows that since the brewing company was bound to collect this extra charge, and could have collected it, it was liable to account for the same to the plaintiff. Any other construction of the agreement would be most unjust to the plaintiff. It would deprive him of all security for the price of his property while it would secure to the defendants every benefit which they sought to obtain by the transaction. The brewing company secured a market for its beer and practically the ownership of the saloon. The plaintiff could not collect the

extra two dollars from Mallon for the beer, since the latter did not agree to pay it to him, but did agree to pay it to the brewing company, and if the latter was not bound to collect it and account for it, and Mallon might pay it or not as suited his convenience, it is difficult to see what the plaintiff got for the transfer of his property. The agreement of the brewing company to *receive* the money meant something more than that it was to become a mere custodian. It meant that when the company sold beer to Mallon it was to charge and collect from him two dollars per barrel over and above the regular market price and apply the extra two dollars on the plaintiff's debt. It had the power to do all that and the plaintiff had not.

The other proposition is, that since there has been some nominal change in the conduct of the saloon, the brewing company is under no further obligations to the plaintiff. It is still in the enjoyment of the right which it had secured by the contract of selling to that saloon all the beer used in the conduct of its business. It has not secured that right in any other way than under this contract. Mallon is still in charge, ordering the beer and paying for it. There is no finding in the record of any real or substantial change in the ownership of the property, or in the conduct of the business. The finding is that it is conducted by Mallon, either for himself or for his wife. We think that the obligations of the parties, as expressed in the writing, have not been affected by this nominal change. The brewing company had the right to charge and collect this extra two dollars for every barrel of beer that it delivered to the saloon, so long as Mallon was in charge and dealing with it. The defendants could not, by such a colorable arrangement between themselves, evade their obligations under the contract or deprive the plaintiff of its benefits. The brewing company is still selling its beer to the saloon in charge of Mallon. It still holds the mortgage and even advanced the money for the liquor tax certificate. It has the same right now that it ever had to exact the extra two dollars for every barrel of beer that it delivered to the

saloon and this right it acquired by the contract in question which conferred upon it almost absolute power over the property, the business and its management. The plaintiff cannot be deprived of the price of his property by mere forms that have effected no substantial change in the situation.

Hence it follows that in stating the account the referee should have charged to the company the extra two dollars for every barrel of beer that it delivered to the saloon.

There are some other questions in the case that have been elaborately argued by counsel, but we do not consider it necessary to consider them, since they may not arise upon another trial. The two propositions we have attempted to deal with are fundamental and when applied to the case will eliminate nearly all of the other questions and now require a reversal of the judgment.

The judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J. (dissenting). If the majority opinion be right in saying that "We think that the fair construction of the agreement is that the brewing company was bound to collect the two dollars per barrel upon all beer which it delivered at that saloon and apply the same for the benefit of the plaintiff," then there is no gainsaying the conclusion reached therein, for more than six hundred barrels of beer were delivered at the saloon. But as the agreement does not say so in express terms, or otherwise, but instead expressly limits its operation to sales of beer to John H. Mallon, I am unable to see how the court can, by so-called construction, read into the agreement a provision that the brewing company bound itself to collect two dollars per barrel upon all beer which might be delivered at that saloon, no matter who should be the occupant and proprietor of it. It was bound to collect two dollars for plaintiff's account for every barrel of beer sold and delivered to Mallon, and the findings are to the effect that the entire amount of beer delivered to him down to and including the last day of April, 1898, when he transferred the business

N. Y. Rep.] Dissenting opinion, per PARKER, Ch. J.

and property to his wife, was four hundred and fourteen and seven-eighths barrels.

The findings are that thereafter she continued to run the business, for the eleventh finding (by which we are bound) is, "That since the 1st day of May, 1898, until the time of this trial, the said hotel business referred to in the tripartite agreement *has been* continued on the same premises *by* Cleopatra Mallon, the wife of the said John H. Mallon, under a lease of said premises in her own name, made to her about said last mentioned date, said business having been conducted *for* said Cleopatra Mallon, by her said husband, John H. Mallon; and said business has been carried on continuously in and upon said premises since the making of said tripartite agreement to the present time, either by said John H. Mallon in his own behalf (which necessarily includes the time from the signing of the agreement down to the first of May, 1898) or in behalf of his wife" (which covers the rest of the period).

Now, the agreement made the payment to plaintiff by the brewing company of the full purchase price dependent upon a sale to Mallon of six hundred barrels of beer. From the findings, as we have seen, it appears that he never sold Mallon any such amount. Therefore, the plaintiff did not become entitled either to twelve hundred dollars or the residue of the purchase price. But, it is said, this presents a very hard case for the plaintiff, and good faith required the brewing company to take action to protect the plaintiff. But that is precisely what the brewing company did, for when Mallon conveyed this property to his wife and she started to do business in her own name, the managers of the brewing company, realizing that the company would be unable to collect anything from her, and that Mallon had made it impossible to carry out the contract, at once offered to transfer to plaintiff all the rights which the company had in the premises, including the mortgage which had been given to it by Mallon. In the absence of evidence indicating misconduct on the part of the defendant brewing company or collusion between it and Mallon, this tender, it is quite apparent, was all that

equity and good conscience required of it; while legally, as is apparent from the facts stated, the plaintiff never became entitled to receive from it but \$839.68, being two dollars a barrel for the beer sold to Mallon.

The judgment should be affirmed, with costs.

MARTIN, VANN, CULLEN and WERNER, JJ., concur with O'BRIEN, J.; PARKER, Ch. J., reads dissenting opinion; GRAY, J., absent.

Judgment reversed, etc.

HENRY VAN REED, Appellant, v. THE PEOPLE'S NATIONAL BANK OF LEBANON, PENNSYLVANIA, Respondent.

1. ATTACHMENT AGAINST SOLVENT NATIONAL BANK PROHIBITED — U. S. R. S. § 5242. Section 5242 of the United States Revised Statutes, prohibiting the issuing of an attachment before judgment against national banking associations by any state, county or municipal court, applies to a solvent national bank.

2. ACTS PROHIBITING ATTACHMENT NOT REPEALED BY ACT OF CONGRESS OF 1882 — CONSTRUCTION OF ACT OF 1882. The act of Congress of July 12, 1882 (22 U. S. Stat. at Large, 162), did not repeal the earlier acts of Congress prohibiting attachments against national banking associations — that act was intended to prescribe the forum for litigation by and against national banks and does not relate to provisional remedies to be had in such actions. It was designed to prescribe the place where and the courts in which such actions may be prosecuted, but it was not intended to regulate the procedure in such actions when brought, nor was it intended to so regulate the method of commencing an action as to enable a state court to acquire jurisdiction over the property of a national bank without acquiring jurisdiction of the bank itself.

Van Reed v. People's Nat. Bank, 67 App. Div. 75, affirmed.

(Argued January 6, 1903; decided January 20, 1903.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 4, 1902, which reversed an order of Special Term denying a motion to vacate an attachment and granted said motion.

On the 6th of September, 1901, a warrant of attachment was issued in this action against the property of the defend-

ant, a solvent national bank, organized under the laws of the United States, located and carrying on business in the state of Pennsylvania. The defendant moved, at Special Term, to vacate the attachment upon the ground that it was issued against a national bank contrary to the statutes of the United States, but the motion was denied. Upon appeal to the Appellate Division the order denying the motion was reversed and the motion granted, two of the justices dissenting, but leave was given to appeal to this court, and the following questions were certified to us for decision :

“*First*. Is the defendant exempt from attachment before judgment under section 5242 of the United States Revised Statutes?

“*Second*. Are the rights claimed by the plaintiff, to attachment against the defendant before judgment and to the jurisdiction thereby acquired, preserved and given by section four of the act of Congress of July 12th, 1882?”

Carlton B. Pierce for appellant. The property of a solvent national bank can be attached. (*Robinson v. Bank*, 81 N. Y. 385; *Market Bank v. Pacific Bank*, 64 How. Pr. 1; *Earle v. Pennsylvania*, 178 U. S. 449; *Petrie v. Comcl. Bank*, 142 U. S. 644.)

Percy S. Dudley and *George B. Woomer* for respondent. The defendant is exempt from attachment before final judgment under section 5242 of the United States Revised Statutes. (*P. Nat. Bank v. Mieter*, 124 U. S. 721; *Bank of Montreal v. F. Nat. Bank*, 49 Hun, 607; *F. Mfg. Co. v. Nat. Bank*, 160 Mass. 398; *Safford v. Nat. Bank of Plattsburgh*, 61 Vt. 373; *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543; *F. Nat. Bank v. La Due*, 39 Minn. 415; *R. R. E. Co. v. S. Nat. Bank*, 46 S. W. Rep. 1026; *P. L., etc., Bank v. Berry*, 91 Ga. 264; *Dennis v. F. Nat. Bank*, 127 Cal. 453.) The act of Congress of July 12, 1882, section 4, neither repealed the clause of section 5242 in question nor gave any new or different right to creditors of national banks in regard

to provisional remedies. (*Raynor v. P. Nat. Bank*, 93 N. Y. 371; *Petri v. C. Nat. Bank*, 142 U. S. 644; *F. Mfg. Co. v. Nat. Bank of Republic*, 160 Mass. 398.)

VANN, J. The questions certified depend upon the construction of certain statutes of the United States, and such construction will be aided by investigating their history.

By section 52 of the National Currency Act, approved June 3rd, 1864, all transfers, assignments, etc., made in contemplation of insolvency by a banking association organized under the act, were declared void. Section 57 of the same act, after naming the courts, including various state courts, in which actions might be brought against national banks, continued as follows: "Provided, however, that all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located." (13 U. S. Stat. at Large, p. 116, ch. 106, §§ 52 and 57.)

By the act of March 3rd, 1873, section 57 of said act was amended by adding thereto the following: "And provided further, That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any state, county, or municipal court." (17 U. S. Stat. at Large, p. 603, ch. 269, § 2.)

By the act to revise and consolidate the statutes of the United States in force on the 1st day of December, 1873, approved June 22, 1874, section 52 of the original act and said amendment of section 57 were consolidated in section 5242 by attaching the latter at the end of the former, but not in the form of a proviso. (U. S. R. S. § 5242.)

The only other statute that is claimed to have any bearing upon the questions presented is an act to enable national banking associations to extend their corporate existence, approved July 12th, 1882. (22 U. S. Stat. at Large, p. 162, ch. 290.) By section four of that act the rights and privileges, as well as the duties and liabilities, of any banking association extend-

ing the period of its succession in accordance with the act, are preserved with this proviso: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

In 1880, the right to issue an attachment against the property of a solvent national bank was sustained by this court, upon the ground that the prohibition of section 5242 applies only to insolvent corporations or those about to become so. (*Robinson v. National Bank of Newberne*, 81 N. Y. 385, 392.)

In 1883, the right to issue an attachment against the property of an insolvent national bank was denied by this court. It was further held that section 5242 was not repealed by the act of July 12th, 1882, because the latter relates to the jurisdiction of courts to entertain suits and the former to particular proceedings in such suits. (*Raynor v. Pacific National Bank*, 93 N. Y. 371.)

In 1887, the subject was considered by the Supreme Court of the United States. (*Pacific National Bank v. Mixer*, 124 U. S. 721.) In that case it appeared that a national bank became embarrassed on the 20th of November, 1881, "and was placed in charge of a bank examiner, in whose control it remained until March 18th, 1882, when its doors were opened for business with the consent of the Comptroller of the Currency." In March and April, 1881, while it was a going concern, and, so far as appears, solvent, attachments were issued against its property, and it was held that they were void. The broad doctrine was laid down by Chief Justice WAITE, with whom all the justices concurred, that an

attachment could not issue out of a state court against the property of a national banking association, whether solvent or insolvent. The court said: "The fact that the amendment of 1873, in relation to attachments and injunctions in state courts was made a part of § 5242, shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that, as it stood originally as part of § 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. That was evidently its purpose when first enacted, for it was part of a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a state court no attachment should issue until after judgment. The form of its re-enactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the state must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank." (p. 726.)

It was also held that the act of July 12th, 1882, did not repeal the prohibition by which the remedy of attachment is taken away altogether, so that it "cannot be used under any circumstances."

In 1889 the subject was considered by the Court of Appeals for the third time in an action in which an attachment had been issued against a national bank on the 18th of June, 1887, and a receiver of the bank was appointed nine days later. The Special Term denied the motion to vacate, but the General Term reversed and vacated the attachment. Upon appeal,

N. Y. Rep.]

Opinion of the Court, per VANN, J.

this court affirmed "on the authority of *Pacific National Bank v. Mixer*" (*supra*). (*Bank of Montreal v. Fidelity National Bank*, 17 N. Y. S. R. 88 ; 112 N. Y. 667.)

Assuming that the banking association in that case was insolvent when the attachment was granted, still it is to be observed that this court did not cite its own *Raynor* case, which involved an insolvent bank, as the authority for its judgment, but cited the *Mixer* case, in which it was held that an attachment against a national bank whether solvent or insolvent is void.

We think, and such is the recollection of Judge GRAY, the only member of the present court who participated in that decision, that it was the intention of this court to yield its previous views to those expressed by the Supreme Court of the United States upon the subject.

All the courts of last resort in the different states that have passed upon the question have held that the prohibition of the Federal statute applies to all national banks, regardless of their pecuniary condition. (*Freeman Manufacturing Co. v. National Bank of the Republic*, 160 Mass. 398 ; *Planters' Loan & Savings Bank v. Berry*, 91 Ga. 264 ; *First National Bank of Kasson v. La Due*, 39 Minn. 415 ; *Dennis v. First National Bank of Seattle*, 127 Cal. 453 ; *Safford v. First National Bank of Plattsburgh*, 61 Vt. 373 ; *Rosenheim Real Estate Co. v. Southern National Bank*, 46 S. W. Rep. [Tenn.] 1026.) The same conclusion was reached by the Circuit Court of the United States for the southern district of New York. (*Garner v. Second National Bank of Providence*, 66 Fed. Rep. 369.)

The power to create national banks carries with it the power to protect them by conferring special rights, privileges and immunities. In 1873 Congress evidently thought that the efficiency of these institutions might be impaired if attachments were issued out of the state courts against their property, and it, therefore, prohibited such writs, among others, altogether. The only question before us is whether that is still the effect of the acts of Congress as they now stand.

While the use of the words, "such association" in section 5242 would justify the construction, contended for by the appellant, that the prohibition is confined to associations which have committed an act of insolvency, the court of last resort for the construction of Federal statutes has decided the other way, and we are bound by its conclusion. (*Pacific National Bank v. Mixter*, *supra*.) We do not think the opinion in that case is obiter so far as it applies to a solvent bank, for as we understand the statement of facts the Pacific National Bank was solvent when the attachments were issued against it. While it became embarrassed six or seven months later, it does not appear that it was insolvent or had committed an act of insolvency, or had done anything in contemplation of insolvency, when the attachments were issued or levied. The chief justice obviously did not write an elaborate opinion to show that an attachment could not issue against an insolvent bank, for that was not open to question. It has always been conceded that the statute at least prohibits an attachment against an insolvent bank, but the question considered and decided was whether an attachment could be issued against a solvent bank. That was a live question still open in that court, and there is no suggestion, either in the statement of facts or the opinion, indicating that the court regarded the question before it as different from the question now before us. The first question certified to us should, therefore, be answered in the affirmative.

The second question involves the effect of the act of July 12th, 1882, but this requires no discussion, as it has already been held by the Supreme Court of the United States, as well as by ourselves, that said act did not repeal the earlier acts of Congress prohibiting attachments against national banks. (*Pacific National Bank v. Mixter*, *supra*; *Raynor v. Pacific National Bank*, *supra*.)

The argument is made that if the defendant had been a foreign state bank with funds here, our courts could have acquired jurisdiction *in rem* through the process of attachment, and that hence the same jurisdiction exists over the

property of a foreign national bank situated in this state. This construction of the last act, however, would violate the spirit of all the acts relating to the subject when read together. We agree with the Appellate Division that "the act of 1882 was intended to prescribe the forum for litigations by and against national banks, and does not relate to provisional remedies to be had in such actions. It was designed to prescribe the place where and the courts in which such actions may be prosecuted, but it was not intended to regulate the procedure in such actions when brought."

Nor, we might add, was it intended to so regulate the method of commencing an action as to enable a state court to acquire jurisdiction over the property of a national bank without acquiring jurisdiction of the bank itself.

We think that the order appealed from should be affirmed, with costs; that the first question certified should be answered in the affirmative and the second in the negative.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and CULLEN, JJ., concur.

Order affirmed.

In the Matter of the Application of the BOARD OF EDUCATION OF THE CITY OF NEW YORK to Acquire Lands Situated on Boerum Street in the Borough of Brooklyn.

ANNIE HOPFENSACK, Appellant; THE CITY OF NEW YORK, Respondent.

1. APPEAL—QUESTION OF FACT. An appeal to the Court of Appeals from an order of the Appellate Division which involves a question of fact must be dismissed.

2. EVIDENCE—PRESUMPTION OF DEATH—CODE CIV. PRO. § 841. *It seems* that section 841 of the Code of Civil Procedure, relating to the presumption of death in certain cases, relates only to a case where the right to the possession of real property depends upon the life of a third person and has no application to a person who is the owner of the property.

3. FACTS AUTHORIZING PRESUMPTION OF DEATH MUST BE PROVED TO ESTABLISH THE FACT OF DEATH. *It seems*, that in order to establish the heirship of petitioners who claimed to be the widow and heirs at law of the owner of property sold under condemnation proceedings, and as such

entitled to an award made therein, proof of no will and that more than seven years have elapsed since he had been seen or heard from by members of his family, is insufficient; there must be other evidence of his death, which, however, may be established by presumptive as well as by direct evidence, but facts must be proved which raise the presumption of death.

Mutter of Boerum Street, 74 App. Div. 682, appeal dismissed.

(Argued January 6, 1908; decided January 20, 1908.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 23, 1902, denying an application by the widow and heirs at law of Ernst Hopfensack for an order directing the chamberlain of the city of New York to pay over to them moneys paid into court in this proceeding.

The facts, so far as material, are stated in the opinion.

Charles H. Griffin for appellant. The fact that over seven years have elapsed since the disappearance of Ernst Hopfensack is sufficient proof for the granting of the order. (*Durando v. Durando*, 23 N. Y. 331; *Cox v. Ellsworth*, 26 N. W. Rep. 460; *Stockbridge v. Stockbridge*, 14 N. E. Rep. 928.)

No one for respondent.

HAIGHT, J. The board of education of the city of New York instituted proceedings to acquire certain real property in the borough of Brooklyn belonging to Ernst Hopfensack for a school building. These proceedings were concluded by an award made to Hopfensack as owner for the sum of \$15,750, and the same was paid into the Supreme Court and deposited with the chamberlain. There was a mortgage upon the premises held by the German Savings Bank for the sum of three thousand dollars which has been paid by the chamberlain. The balance is now claimed by the petitioners herein, Anna Hopfensack, Charles Hopfensack and Eleanor Hopfensack.

It appears that Ernst Hopfensack and Anna Hopfensack were married in the year 1871 and lived together as husband

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

and wife until the 23d day of August, 1894, and that Charles and Eleanor Hopfensack are their only children and heirs at law; that on the last-mentioned day Ernst Hopfensack left his place of residence at No. 49 St. Mark's Place in the city of New York in the morning to go to his place of business and that between the hours of twelve and two o'clock of that day he was seen at Maspeth, L. I. near Newtown creek, at which place he owned real property which he rented for a road house and saloon, and that this was the last that he has ever been seen or heard from by members of his family.

It is contended on behalf of the petitioners that they are entitled to have the money deposited with the chamberlain paid over to them as his widow and heirs at law, there being no will, upon the ground that more than seven years have elapsed and that they are entitled to the same under section 841 of the Code of Civil Procedure. The Appellate Division held that that section relates only to a case where the right to the possession of real property depends upon the life of a third person, and that it has no application to a person who is the owner of the property, and, therefore, the court denied the application of the petitioners, but with leave to renew on further proof tending to show the death of Ernst Hopfensack.

We think the construction of the Appellate Division given to section 841 of the Code of Civil Procedure is correct. The provision, so far as applicable, is as follows: "A person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question." This was a re-enactment of the Revised Statutes (1 R. S. 749) which in turn was substantially taken from 19 Car. II, c. 6 (1667), which so fully describes the purpose and intent of the enactment that we insert its provisions so far as applicable: "Whereas divers Lords of Manors and others have used to grant estates by copy of court-roll for one, two or more life or lives, according to the custom of their several manors, and have also granted

estates by lease for one or more life or lives, or else for years determinable upon one or more life or lives ; and it hath often happened, that such person or persons for whose life or lives such estates have been granted, have gone beyond the seas, or so absented themselves for many years, that the lessors and reversioners cannot find out whether such person or persons be alive or dead, by reason whereof such lessors and reversioners have been held out of possession of their tenements for many years, after all the lives upon which such estates depend are dead, in regard that the lessors and reversioners when they have brought actions for the recovery of their tenements, have been put upon it to prove the death of their tenants, when it is almost impossible for them to discover the same.

“ For remedy of which mischief so frequently happening to such lessors or reversioners, Be it enacted by the King’s Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That if such person or persons, for whose life or lives such estates have been or shall be granted as aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action commenced for recovery of such tenements by the lessors or reversioners ; in every such case the person or persons upon whose life or lives such estate depended, shall be accounted as naturally dead ; and in every action brought for the recovery of the said tenements by the lessors or reversioners, their heirs or assigns, the judges before whom such action shall be brought, shall direct the jury to give their verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead.”

Under both the common and civil law, a person was presumed to be living for a period of one hundred years from the time of his birth, that being the longest limit of an ordinary life. But at an early time several of the countries in which the civil law was in force modified the presumption

with reference to death by statutes adopting different periods. In England it was modified by the statute to which we have called attention and also by the statute with reference to bigamy (1 Jac. I, ch. 11), which has also been brought down to us and is found in our own statute which permits the remarriage of a person after the absence of the husband or wife for the period of five years.

Section 1582 of our Code of Civil Procedure has reference to the partition of real estate, but by analogy has some pertinence as showing the legislative trend, for it contains a provision with reference to absent owners and provides that as to such owners their portion must be invested in permanent securities at interest for their benefit until claimed by them, or their legal representatives. Section 2656 of the Code is even more important. It bears a closer analogy to the question under consideration. It pertains to the establishing of heirship, which the petitioners in this case are attempting. Among its provisions we find the following: "The petitioner must establish, *by satisfactory evidence, the fact of the decedent's death*; the place of his residence at the time of his death; his intestacy, either generally, or as to the real property in question," etc.

Shortly after the passage of the bigamy and life tenancy acts in England, providing that the presumption of death may be indulged after an absence of seven years, the courts, by analogy, extended the presumption to cases involving the distribution of personal property. (*King v. Paddock*, 18 Johns. 141, 143; *Eagle's Case*, 3 Abb. Pr. 218, 220.)

In Best on the Law of Evidence it is said: "The death of any party once shown to have been alive, is matter of fact to be determined by a jury; and as the presumption is in favor of the continuance of life, the onus of proving the death lies on the party who asserts it. The fact of death may, however, be proved by presumptive as well as by direct evidence. When a person goes abroad, and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was

last heard of. And the same rule holds generally with respect to persons who are absent from their usual places of resort, and of whom no account can be given. This is incorrectly spoken of in some books as a presumption of law, but it is in truth a mixed presumption said to have been adopted by analogy to the statute 1 Jac. I, c. 11, s. 2, which exempts, from the penalties of bigamy, any person whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within the Kings Dominions, the one of them not knowing the other party to be living within that time; and the 19 Car. II, c. 6, s. 2, respecting the lives of persons in leases, who shall remain beyond the seas, or elsewhere absent themselves in the realm for more than seven years, and who are thereupon, in the absence of proof to the contrary, to be deemed naturally dead." (§§ 408, 409.) To the same effect is 1 Greenleaf on Evidence, § 41. It will thus be seen that while death must be proved it may be established by presumption as well as by direct evidence. But facts must be disclosed which would raise such presumption. A person may be absent and unheard of by his friends for seven or more years, under circumstances in which no presumption of death would attach. He may have no near or intimate friends with whom he has been accustomed to correspond. He may leave with the expressly declared intention of seeking a home and of engaging in business in another place, and of not returning to the place of his former residence; then again, he may leave under circumstances which will readily satisfy the court that he must be dead or he would have returned or reported the cause of his detention, especially after search has been made for him and he has not been found within the period of seven years of his departure.

The case under consideration is one in which apparently the merits are strongly with the petitioners, and doubtless the Supreme Court will not require direct and positive evidence of death, but it is the duty of the court to proceed with care

N. Y. Rep.]

Statement of case.

and insist upon there being produced before it all of the evidence there is upon the subject. This it properly should exact. It was shown that Hopfensack was addicted to drink and yet when he was last seen at Maspeth his condition was not disclosed. Mrs. Hopfensack gave it as her opinion that he had been murdered, and yet the reasons upon which she founded her belief were not stated; the character of the neighborhood or place in which he was last seen was not given. If it was dangerous and frequented by criminals and dangerous characters those facts should have been made to appear.

The Appellate Division, in denying the appellant's motion in this proceeding, gave the petitioners the right to renew the motion upon further proof. The petitioners should have adopted this course and exhausted all of the evidence that they were capable of producing upon the subject.

This court, under the Constitution, is limited in its power of review to questions of law. The question involved in this case is purely one of fact, and we think, therefore, that the appeal should be dismissed, without costs, and that the petitioners should resort to the remedy given by the Appellate Division in the order appealed from.

PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN and CULLEN, JJ., concur.

Appeal dismissed.

JAMES RIDDLE, as Administrator of the Estate of DAVID B. ALEXANDER, Deceased, Respondent, v. FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY, Appellant.

CONTRIBUTORY NEGLIGENCE. Where, upon the trial of an action for negligence, it appears that the plaintiff's intestate, who was an employee of contractors excavating under defendant's street railway, over which cars were continually passing, was working in a trench, that he was struck by a car, which he saw as it approached, that he leaned back so as to be out of its way, that there was plenty of room in the trench for him to remain at a safe distance from the car as it passed, and had he done so no

injury would have resulted, but he raised up, and bringing his face nearer to the car, came in collision with the step, he must be deemed guilty of such contributory negligence as will prevent a recovery in the action.

Riddle v. Forty-second St., M. & St. N. A. Ry. Co., 72 App. Div. 619, reversed.

(Submitted January 15, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 22, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles F. Brown, Addison C. Ormsbee and Henry A. Robinson for appellant. The complaint should have been dismissed on the ground that the plaintiff failed to show absence of contributory negligence on the part of deceased. (*Knisley v. Pratt*, 148 N. Y. 372; *Gibson v. E. R. R. Co.*, 63 N. Y. 449; *Buckley v. G. P. & R. M. Co.*, 113 N. Y. 540; *Marsh v. Chickering*, 101 N. Y. 396; *Nolan v. M. S. Ry. Co.*, 65 App. Div. 184; *Neumeister v. Eggers*, 29 App. Div. 385; *Ward v. Mayor, etc.*, 19 App. Div. 48; *Wiwrowski v. L. S. & M. S. R. Co.*, 124 N. Y. 420; *Bond v. Smith*, 113 N. Y. 378; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248.) The complaint should have been dismissed because the plaintiff failed to show any negligence on the part of defendant. (*Pakulinsky v. N. Y. C. & H. R. R. Co.*, 82 N. Y. 424; *Daniels v. S. I. R. T. Co.*, 125 N. Y. 407; *Huber v. N. E. R. R. Co.*, 22 App. Div. 426.)

Thomas Darlington for respondent. The various exceptions were not well taken. (*Moody v. Rowell*, 17 Pick. 498; *Worrall v. Parmelee*, 1 N. Y. 519; *Shorter v. People*, 2 N. Y. 193; *Harnett v. Garvey*, 66 N. Y. 641; *Cowley v. People*, 83 N. Y. 464; 24 How. Pr. 172; *Masten v. Deyo*, 2

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

Wend. 424; *Bengivena v. B. H. R. Co.*, 48 App. Div. 515; *McDonald v. M. S. R. R. Co.*, 167 N. Y. 66; *Lewis v. B. R. R. Co.*, 35 App. Div. 12.)

HAIGHT, J. This action was brought to recover damages for the alleged negligent killing of David Brown Alexander, commonly known as David Brown. The plaintiff was his maternal aunt, with whom he lived and supported. It does not appear that he left other relatives.

The decedent was a carpenter in the employ of Naughton & Co., contractors, who were engaged in altering switches for the defendant company. At the time of the accident they were engaged in changing a switch on the Boulevard near Seventy-first street in the city of New York, at which point the tracks curve around and run down Tenth avenue. An excavation had been made under the tracks twelve or fifteen feet square, with a trench on the outer side of the curve several feet in length and between three and four feet in depth, so as to make a change of the gas pipes underneath the tracks. The decedent and one Lloyd were engaged in bracing up the tracks of the railway company and in watching the bracings as the cars passed over the tracks, the decedent acting as foreman and Lloyd as his helper. The cars upon the defendant's road were operated by electricity taken from a power rail which had been removed for the space of about twenty-five feet on either side of the excavation, and the defendant's cars ran over the tracks at that point by means of the momentum obtained before reaching the point where the power rail had been removed. The cars passed about a minute and a half apart. At the time of the accident the decedent and Lloyd were in the trench stooping down when one of the defendant's cars approached from the north, passing over the excavation. As it approached the decedent leaned back in the trench so as to be out of the way of the car, and it appears to have partially passed, at which time he straightened up, bringing his face nearer to the car. In rounding the curve the rear step of the car extended farther from the

track by some eight or ten inches than when running on a straight track, and in passing it struck the decedent upon the bridge of the nose, knocking him backwards on to the side of the trench. After the accident the decedent arose. There was a mark upon his nose where a small piece of the skin was torn off. Some one of the men present supplied him with a piece of court plaster which he pasted over the place of the injury and then he returned to his work in the trench where he remained, according to the testimony of Lloyd, the plaintiff's witness, for the space of about twenty minutes, and by other witnesses from an hour to an hour and a half, and then he left, going to the tool house a short distance away, complaining of a pain in his head. This was about eleven o'clock in the forenoon. He remained at the tool house the rest of the day. When the rest of his fellow-workmen quit work in the evening he went to a saloon near by, where he remained until about nine o'clock in the evening. During the day he appears to have been in a partial stupor, sleeping some of the time. At other times he was troubled with nausea and vomited, and was unable to walk without assistance, and in attempting to do so on two or three occasions fell down. He was taken home from the saloon in a cab, assisted into his house and to bed, and appears to have gone to sleep. The next morning he was found unconscious by his aunt, and subsequently he was removed to the J. Hord Wright Hospital, where he died during the day. Upon the post mortem examination a slight abrasion was found upon the back of the head and a clot of blood of the size of a small hen's egg in the temporal lobe of the brain on the right side. The cause of his death was cerebral hemorrhage causing apoplexy. The walls of the blood vessels had the appearance of being degenerated and in an unhealthy condition.

The contention of the plaintiff was to the effect that he was a strong, healthy, temperate man; and on the part of the defendant that he was very intemperate; had drank liquor several times that morning before the accident and that he had complained of pain in his head for a number of days;

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

that he was drunk during the day and evening, and vomited several times. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit upon the ground that no negligence had been shown on the part of the defendant and that it affirmatively appeared that the decedent was guilty of contributory negligence, and this motion was renewed upon the close of the evidence. It was denied on each occasion and an exception taken. The verdict was in favor of the plaintiff and the judgment entered thereon has been affirmed by the Appellate Division, but the affirmance does not appear to have been unanimous.

We think that the motion for a nonsuit or for the direction of a verdict should have been granted. The only negligence charged against the defendant was in not warning the decedent of the approach of its car. Upon this question the evidence may be conflicting; some of the persons present testified that the gong was sounded, but Lloyd, who was in the trench with the decedent, did not hear it. It, however, is undisputed that the contractors employed a man to stand by the trench and give warning to the men in the trench of the approach of a car and that this was done on this occasion. But, assuming that no warning was given, the fact remains that the decedent saw the car as it approached; that he leaned back in the trench so as to be out of its way; that there was plenty of room in the trench for him to remain at a safe distance from the car while it passed, and had he done so no injury would have resulted; but by raising up and bringing his face nearer to the car while it was passing he came in collision with the step. This was his own act, and we think it was contributory negligence on his part. He appears to have been an intelligent man, and, as we have seen, was the foreman in charge of the work. He knew that the trench was at the point where there was a curve in the tracks around which the cars ran into Tenth avenue, and that in rounding the curve the rear of a car would be thrown a greater distance from the track than the side of the car when running upon a straight line. He was familiar with the situation; he under-

stood the dangers, and in engaging to do the work undertook the risks.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ., concur.

Judgment reversed, etc.

SOPHIE G. PARKER, as Executrix of ASA W. PARKER,
Deceased, Appellant, v. MORRIS F. BEER et al.,
Respondents.

WILL — DISCRETIONARY POWER OF SALE OF REAL ESTATE — CODE CIV. PRO. § 2759. A testamentary power of sale, "I authorize and empower such executors who act to sell and convey any real estate of which I die seized," with no mention in the will of testator's debts, is discretionary, not imperative, and does not deprive a creditor of the right to a judicial sale of the real estate under section 2759 of the Code of Civil Procedure relating to the sale of a decedent's real property for the payment of debts.

Parker v. Beer, 65 App. Div. 598, affirmed.

(Argued January 13, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 20, 1902, in favor of defendants upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

This was a submission to the Appellate Division of the Supreme Court, in the second judicial department, of a controversy between the parties to an agreement, for the sale by the plaintiff and for the purchase by the defendants of real estate. The defendants refused to take the title, upon the ground that the plaintiff could not convey one that was clear and marketable. The facts were that the plaintiff derived what right she had to make the sale, as the executrix of the will of Asa W. Parker, deceased. When he died, his personal estate was of no value and the equity in his real estate did not exceed, in value, \$10,000; which was very considerably less

N. Y. Rep.]

Statement of case.

than the admitted debts. The plaintiff contracted to sell within a year of testator's death. The will was brief and in the following words: "I give all my property to my executors, or those who act as executors, their survivors or survivor, to use and dispose of the same as though I died intestate.

"I authorize and empower such executors who act to sell and convey any real estate of which I die seized.

"I name as such executors my wife, Sophie G. Parker, my children, Asa W. Parker, Jr., Gordon Parker and Mabel C. Parker.

"I revoke all former wills by me made."

The Appellate Division awarded judgment to the defendants, upon the ground, in substance, that the power of sale was discretionary and not imperative and, hence, did not deprive a creditor of the right to a judicial sale of the real estate of the testator, under the provisions of the statute. (See *Código Civ. Pro.* §§ 2750, 2759.) The plaintiff then appealed to this court.

Samuel Keeler and *C. D. Rust* for appellant. Whether the power of sale is discretionary or not, or given for the payment of debts or not, is immaterial; after its exercise the creditor cannot compel the sale of the real estate over again. The purchaser would get a good title. (*Glaucius v. Fogel*, 88 N. Y. 435; *Matter of Gantert*, 136 N. Y. 112.) The proceeds of the sale would be assets in the hands of the executor for the payment of debts. (*Irwin v. Loper*, 43 N. Y. 525; *Matter of Gantert*, 136 N. Y. 113; *Code Civ. Pro.* § 2726.) The power of sale in the will is clear and explicit, and is not discretionary. (1 R. S. 734, § 96; *Van Bosberk v. Herrick*, 65 Barb. 257; *Smith v. Floyd*, 140 N. Y. 337.)

A. M. Fragner for respondents. A power of sale in a will gives to the donee of the power only such power as is expressly set forth in the will. (*Clift v. Moses*, 116 N. Y. 155; *Taylor v. Dodd*, 58 N. Y. 335; *Hoyt v. Hoyt*, 85 N. Y. 142.) A power of sale for the payment of debts must be

expressly set forth, and the court will not infer such a power from mere vague and indefinite expressions. (*Matter of Thompson*, 41 N. Y. Supp. 1103; *Gourmly v. Campbell*, 66 N. Y. 173; *Matter of Johnson*, 46 N. Y. Supp. 54; *Lupton v. Lupton*, 2 Johns. Ch. 214; Code Civ. Pro. § 2749.) The right of creditors to apply to the courts for the sale of decedent's real estate, where the personalty is insufficient to pay his debts, is absolute, and can only be defeated where an express power is given to sell the land for the payment of debts. (*Matter of Campbell*, 21 N. Y. Supp. 688; *Scholle v. Scholle*, 113 N. Y. 274.) From the fact that the decedent died with insufficient personalty to pay his debts, leaving a will with power of sale to the executor, it cannot be deduced that the testator had in mind the sale of his real estate to pay debts. (*Matter of Powers*, 124 N. Y. 368; *Matter of McComb*, 117 N. Y. 381.) In order to deprive a creditor of his right under the statute, to apply to the court for the sale of the testator's real estate, the power of sale must be mandatory, not discretionary. (*Matter of Gantert*, 136 N. Y. 106; *Gourley v. Campbell*, 66 N. Y. 169; *Parker v. Linden*, 113 N. Y. 28; *Chamberlain v. Taylor*, 105 N. Y. 185; *Matter of City of Rochester*, 110 N. Y. 166.) A creditor cannot be debarred from enforcing his right under the statute, to a sale of decedent's real estate for the payment of his claim, and a purchaser if compelled to accept title tendered by an executor would be purchasing the property subject to such rights. (*Hobson v. Hale*, 35 N. Y. 605.)

GRAY, J. I think the determination by the Appellate Division was correct. The power of sale given by this will cannot be regarded as an express direction to sell the testator's real property for the payment of his debts and, therefore, it not being imperative, its exercise could not be compelled by a creditor. Section 2759 of the Code of Civil Procedure provides that a decree directing the disposition of real property can be made, only, where "the property directed to be disposed of was not effectually devised expressly charged with

N. Y. Rep.]

Statement of case.

the payment of debts, or funeral expenses, and is not subject to a valid power of sale for the payment thereof." The statute is explicit. There is no mention by the testator of his debts. With a will as bare as is this one, a purpose to charge the payment of debts upon the real estate would have to rest on implication and inference. This is not what the statute intended and we think it a safer rule, in the interest of creditors, as, also, for greater certainty of title, to hold that the statutory requirements, if not literally followed, must be met by clear testamentary expressions, in order to deprive creditors of their statutory right to a judicial sale.

For these reasons, the judgment should be affirmed, with costs.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ., concur.

Judgment affirmed. _____

MARY POTTS, Appellant, v. FRED N. DOUNCE, as Executor of OPHELIA C. DOUNCE, Deceased, Respondent, Impleaded with Others.

PLEADING — ACTION AGAINST PERSONAL REPRESENTATIVE OF DECEASED JOINT DEBTOR — INSOLVENCY OF THE SURVIVORS OR THEIR INABILITY TO PAY MUST BE ALLEGED — CODE CIV. PRO. § 758. While section 758 of the Code of Civil Procedure, relating to proceedings upon the death or disability of a party, provides that "the estate of a person or party jointly liable upon contracts with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter," that section does not dispense with the necessity of appropriate averments and proof of the insolvency, or the inability to pay, of the surviving joint debtors when joining the personal representatives of the decedent as defendants in an action upon the contract. The section creates the legal liability, but does not change the rule of procedure, and the remedy to enforce the liability is to be pursued upon such pleadings and proofs as would show an equitable reason for joining the personal representatives of a deceased joint debtor as defendants in an action against the survivors upon the contract.

Potts v. Baldwin, 67 App. Div. 434, affirmed.

(Argued January 9, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 16, 1901, affirming a judgment in favor of defendant entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

E. J. Baldwin and *Cassius A. Phillips* for appellant. The personal representatives of the decedent Ophelia C. Dounce were properly joined in this action. The complaint was properly framed and under the evidence the plaintiff was entitled to recover against all of the defendants. (*Getty v. Binasse*, 49 N. Y. 385; *Wood v. Fisk*, 63 N. Y. 245; *Risley v. Brown*, 67 N. Y. 160; *Richardson v. Draper*, 87 N. Y. 337; *Johnson v. Harvey*, 84 N. Y. 363; *Bradley v. Burwell*, 3 Den. 61; *Randall v. Sackett*, 77 N. Y. 480; *Barnes v. Seligman*, 55 Hun, 349; *Chard v. Hamilton*, 56 Hun, 259; *Smith v. Osborne*, 31 Hun, 390.)

Judson A. Gibson for respondent. The referee correctly held that the defendant Fred N. Dounce, as executor of Ophelia C. Dounce, a joint maker of the promissory note in question, was improperly joined in this action under the allegations of the complaint. (Code Civ. Pro. §§ 1932, 1947; *Barnes v. Seligman*, 55 Hun, 349; *Pope v. Cole*, 55 N. Y. 127; *F. N. Bank v. Lenk*, 32 N. Y. S. R. 191; 123 N. Y. 638; *Merrill v. Blanchard*, 7 App. Div. 167; 158 N. Y. 682; *Barnes v. Brown*, 130 N. Y. 372; *Matter of Robinson*, 40 App. Div. 23; *Randall v. Sackett*, 56 How. Pr. 225; *Hoyt v. Bonnett*, 50 N. Y. 538; *Richter v. Poppenhausen*, 42 N. Y. 373.)

GRAY, J. This was an action upon a promissory note, made in the following form: "\$1,000.00. Elmira, N. Y. May 21, 1892. Two years after date we promise to pay to the order of Mary Potts one thousand dollars, with interest, value received. Interest payable semi-annually. (Signed) Francis

N. Y. Rep.]

Opinion of the Court, per GRAY, J.

E. Baldwin, Mary S. Daggett, Julia E. Smith, Ophelia C. Dounce." The complaint, simply, alleged the making of the note; the death of Ophelia C. Dounce, one of the makers, and the issuance of letters testamentary to the executor named in her will, who is joined as a defendant with the three survivors of the makers, and, finally, the non-payment of the note. The only answering defendant was the executor, who, *inter alia*, alleged that the note in suit was a joint and not a several note; that, upon her death, the obligation of Ophelia C. Dounce was discharged and that her executor was improperly joined in the action. Upon the opening of the trial, counsel for the executor moved for the dismissal of the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. At the conclusion of the trial, a similar motion was made, with the additional ground stated that the evidence failed to make out a cause of action against the executor and showed that he was improperly joined as a party defendant. No application was made to amend the complaint. The referee, before whom the case was tried, upon the issues raised by the executor's answer to the complaint, found, among other facts, that the note was made to the plaintiff upon her advancement of the moneys to the makers for the benefit of a corporation, of which they were officers and trustees. He decided that, upon the pleadings and the facts, the executor was entitled to a dismissal of the complaint and directed judgment accordingly. The judgment entered upon the referee's decision was unanimously affirmed and the plaintiff has appealed to this court.

The question, which comes here, is whether the executor of one of the deceased makers of the note was properly joined as a defendant. The theory of the decision below, and, in my opinion, it is correct, was that, as this was a joint note of the makers, it was necessary to the sufficiency of the plaintiff's cause of action against the executor that she should allege in her complaint and prove upon the trial the insolvency of the survivors, or the inability to recover against them. The position of the appellant, as I view it, is that section 758 of the Code of Civil Pro-

cedure, as amended in 1877, has changed the rule with regard to joint debtors and now authorizes the maintenance of an action against the personal representatives of a deceased joint debtor, in the same way as though the contract creating the liability had been joint and several. Section 758 is enacted in that part of the Code, which relates to "Proceedings upon the death or disability of a party, or the transfer of his interest" and provides that, in case of the death of one or two or more plaintiffs, or defendants, if the entire cause of action survives to, or against, the others, the action may proceed in favor of, or against, the survivors; "but the estate of a person or party, jointly liable upon contract with others, shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter." While this section, by its place in the Code, is applicable to the case of the death of a party pending the action, it must, nevertheless, be regarded as making a material alteration in the law and as imposing a liability where none existed before. (*Randall v. Sackett*, 77 N. Y. 480.) But there is no reason for holding that the section dispenses with the necessity of appropriate averments and proof of the insolvency, or the inability to pay, of the surviving joint debtors, when joining the personal representatives of the deceased debtor as defendants, in an action upon the contract. The section creates the legal liability; but it does not prescribe the procedure. To hold otherwise would be to lose sight of an essential distinction between the engagement of a joint debtor and that of a joint and several debtor. That remains as it always has been. Upon the death of the former, the survivors become principal debtors and it is then their duty to discharge the obligation assumed; although they would have the right to compel contribution from the estate of the deceased. In this case, the deceased maker was a joint debtor, and not a mere surety. At common law, her death would have terminated her liability; but, while no action at law could have been brought against her estate, as she

N. Y. Rep.]

Opinion of the Court, per GRAY, J.

was a joint debtor, equity, if an inability to collect from the survivors were shown, would have allowed a recovery against the estate. (1 Parsons on Contracts, 30; *Grant v. Shurter*, 1 Wend. 148; *Richardson v. Draper*, 87 N. Y. 337.) Section 758 of the Code, now, by continuing the legal liability of the estate of the deceased, enables that liability to be enforced in an action at law. It effects, directly, what, formerly, equity intervened to accomplish. But, while the legal rule of liability has been changed, the rule of procedure is not and when the personal representatives of the deceased joint debtor are directly proceeded against at law, the plaintiff should, still, allege and prove the insolvency, or inability to pay, of the survivors. The principle of liability of debtors upon a joint contract should make that proposition sufficiently clear, in my opinion. (See *Barnes v. Brown*, 130 N. Y. 372; *First National Bank v. Lenk*, 32 N. Y. S. R. 191; *affd.*, 123 N. Y. 638; *Merrill v. Blanchard*, 7 App. Div. 167; *affd.*, 158 N. Y. 682.) The principle is the same whether the contract be an ordinary joint undertaking, or one of partnership. In *Pope v. Cole*, (55 N. Y. 124), which was for the recovery of a partnership debt against the executrix of a deceased partner, Judge GROVER observed, in his opinion, that "payment of a joint debt, when no partnership between the debtors ever existed, can be enforced out of the estate of one of the deceased debtors under the same circumstances only as in the case of partners, that is, by showing an inability to collect the debt from the survivor." In *Barnes v. Seligman*, (affirmed here, *supra*), the question was discussed by the General Term of the first department, (55 Hun, 339, 349), whether there was any limitation of the doctrine to cases of partnership contracts. It was held, upon the authority of *Pope v. Cole*, that there was no reason for the limitation and that the principles upon which the cases proceeded, which held that proof of insolvency under proper averments was necessary in order that a recovery might be had against the representatives of the deceased partner, make no such distinction as was claimed, inasmuch as "that it was

not a legal right which is attempted to be enforced, but an equitable one." I perceive no legal distinction between survivorship as between copartners and survivorship as between joint debtors.

I think we should hold that, while section 758 creates a liability which did not exist at common law, it does not affect the procedure and that the remedy to enforce the liability is to be pursued upon such pleading and proofs, as would show an equitable reason for joining the personal representatives of a deceased joint debtor as defendants in the action against the survivors upon the contract.

I think the judgment below was right and should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ., concur.

Judgment affirmed.

WILLIAM C. BREED et al., as Receivers of the NEW YORK NATIONAL BUILDING AND LOAN ASSOCIATION, Appellants, v. LEONARD RUOFF et al., Respondents.

FORECLOSURE ACTION—WHEN SALE CANNOT BE POSTPONED BY A JUDGMENT WHICH IS PRACTICALLY A PERPETUAL STAY OF PROCEEDINGS. Where, upon the trial of an action to foreclose a mortgage brought by the receivers of a loan association upon which some amount was due, the court declined to find the amount due or to award a judgment of foreclosure and sale for any portion of the mortgage debt, upon the theory that, owing to litigation pending and uncertainty as to the amount of the assets of the association, it was then impossible for the receivers to state even approximately the amount of the dividends which the defendants would be entitled to receive upon their stock in the association, and postponed the foreclosure and sale until that fact could be ascertained upon the final accounting of the receivers and directed that a judgment should be entered for its ascertainment as soon as the assets of the association were sufficiently liquidated for the purpose, the judgment must be reversed; the plaintiffs are entitled to a sale of the premises to secure the payment of their mortgage debt and cannot be deprived of it unless some adverse dominating equity requires it and the proofs bring the case within the exceptional class.

Breed v. Ruoff, 71 App. Div. 621, reversed.

(Argued January 14, 1903; decided January 27, 1903.)

APPEAL from an order or alleged judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 3, 1902, affirming a determination entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

G. D. B. Hasbrouck and Russell S. Johnson for appellants. The decree of the Special Term, though not technically so, was really final. (*Breed v. Ruoff*, 66 N. Y. Supp. 427; *Mills v. Hoag*, 7 Paige, 18; *Pullman v. Christain*, 6 Hun, 209; *Craighead v. Wilson*, 18 Hun, 202; *Thomson v. Dean*, 7 Wall. 342; *Winthrop v. Meeker*, 109 U. S. 180; *McGourkey v. T. & O. R. R. Co.*, 146 U. S. 548.) If the decree is not final it is unwarranted in the law and void. (*Rogers v. Raines*, 38 S. W. Rep. 483; *Strohen v. Assn.*, 115 Penn. St. 273; *Rogers v. Huego*, 92 Tenn. 38; *Meares v. Davis*, 28 S. E. Rep. 188; *Thompson v. Assn.*, 120 N. C. 420; *Moran v. Gray*, 38 Atl. Rep. 668; *Towle v. Am. Society*, 61 Fed. Rep. 446; Code Civ. Pro. § 3333.) The Supreme Court should have directed judgment of foreclosure and sale for the amount proved due on the bond and mortgage. (*Outwater v. Moore*, 124 N. Y. 66.)

Thaddeus D. Kenneson and Edward J. Mone for respondents. The Court of Appeals has no jurisdiction of this appeal. (Code Civ. Pro. § 190; *Van Arsdale v. King*, 155 N. Y. 325.) The judgment appealed from is an interlocutory judgment and not a final judgment, and this court has no jurisdiction to entertain this appeal. (*Tompkins v. Hyatt*, 19 N. Y. 534; *King v. Barnes*, 107 N. Y. 645; *McKeown v. Officer*, 127 N. Y. 617; *Catlin v. Grissler*, 57 N. Y. 357; *Jones v. Jones*, 81 N. Y. 35; *Raynor v. Raynor*, 94 N. Y. 248; *Anderson v. Daley*, 159 N. Y. 146.)

Per Curiam. This action was for the foreclosure of a mortgage given by the defendants to the New York National

Building and Loan Association which, by reason of the insolvency of such association, came into the hands of the plaintiffs as receivers thereof. It was to secure the sum of twenty-five hundred dollars advanced by the association to the defendants. The bond and the mortgage to secure it both provided that in case of default in payment of that sum or any part thereof, the principal of twenty-five hundred dollars, and any and all sums for interest, premiums, dues and fines thereon, should, at the option of the association, its successors or assigns, become due and payable.

That some amount was due upon the mortgage, according to its terms and provisions, there is no doubt; but the trial court declined to find the amount due or to award a judgment of foreclosure and sale for any portion of the mortgage debt. This was based upon the theory that, owing to litigations pending and uncertainty as to the amount of the assets of the association, it was then impossible for the receivers to state, even approximately, the amount of the dividends which the defendants would be entitled to receive upon their stock in the association. Therefore, instead of ascertaining the amount due upon the mortgage and awarding the plaintiffs a judgment of foreclosure and sale for that sum, and leaving the amount of the dividends due the defendants which could not be then ascertained to be determined and adjusted upon the final settlement of the receivers' account, the court ordered that the foreclosure and sale be postponed until the sum of credits due to the defendant Leonard Ruoff, Sr., be finally cast upon the accounting of the receivers, and that a judgment should be entered for the ascertainment of that amount as soon as the assets of the association were sufficiently liquidated for the purpose.

The first question which is presented relates to our jurisdiction. The contention of the respondents is that the judgment is interlocutory, and, hence, not appealable to this court. That it has been denominated throughout as an interlocutory judgment is a fact, but that is not absolutely controlling. This court said in *Otten v. Manhattan R. Co.* (150 N. Y. 395,

401) that the court below could not create a question of fact by declaring that there was one. So, here, the court could not make such a judgment interlocutory merely by declaring it to be such. Therefore, the more important question is whether it is in fact an interlocutory judgment, a judgment finally determining the case, or practically a judgment awarding a perpetual stay of the action. It certainly was not a judgment finally adjudicating the rights of the parties. As we have seen, the action was to foreclose a mortgage, to which relief the plaintiffs were apparently entitled. Instead, however, of awarding them that relief, the court granted what it denominated an interlocutory judgment for the ascertainment of the amount of dividends to which the defendants are entitled, as soon as practicable, and the assets of the plaintiffs are sufficiently liquidated, with no provision for ascertaining the amount by reference, by trial before the court, or otherwise. Thus the effect of this adjudication was to stay the proceedings of the plaintiffs indefinitely, and to make their rights depend upon the practicability of such a determination, which was when the assets of the plaintiffs were sufficiently liquidated. This provision was unique in its uncertainty as to time, as to the manner of execution, and as to the sufficiency of the liquidation required. With no provision as to the means or manner of ascertainment, the court has declared that the amount of dividends to which the defendants may ultimately be entitled shall be determined when the assets of the association are sufficiently liquidated. This leads to the inquiry how and when the assets are to be liquidated. This can only be accomplished by a judicial or contractual determination, not only of their amount, but also of their value, followed by their payment or collection. If payment is refused and the courts are closed to the receivers when seeking to ascertain, liquidate and collect the amount due from the debtors to the association, it would seem quite impossible for them to ever liquidate the amount of their assets. Moreover, if the courts may refuse to determine the amount due in one case, they may in all, and it would follow

that no such liquidation could be had. Thus we see that the ascertainment provided for in this case is postponed until the happening of an event which is quite likely never to occur.

A judgment that provides for certain and definite action in a case before a final judgment shall be entered, may be an interlocutory judgment, but when a court declares in effect that it will not proceed with the case either under such judgment or in pursuance of the interlocutory order, without providing any definite act to be performed, or the manner of performance, it can hardly be said to be an interlocutory judgment, especially where, as in this case, it amounts practically to a perpetual stay of proceedings, because the fact to be ascertained is impossible of ascertainment before final judgment. It may be said that there was a provision by which the parties might apply for a further order or judgment when the amount due the defendants, if any, should be ascertained. True, but the alleged judgment or order, without providing any time or manner for ascertaining the dividends, has given leave, not to apply to have them ascertained, but, after they have been ascertained in some manner not referred to or described in the judgment, to apply for some further order or judgment. We are of the opinion that this determination was not an interlocutory judgment, within the ordinary acceptation of the term, but was a judgment practically staying the proceedings of the plaintiffs without limit, and in that respect was essentially final, and, therefore, the subject of review by this court. In other words, we think that there was a mistrial of this action, and that the rights of the parties are the same as though no judgment had been entered herein. If this had been a case where the court could have ascertained the amount of dividends to which the defendants were entitled, and it had provided for such ascertainment, by reference or otherwise, before final judgment, its action would have been justified and the judgment would have been interlocutory. But in this case it is an admitted fact that it is impossible to ascertain the amount of dividends, even approximately. Therefore, as suggested, it being impos-

sible to meet the condition upon which its proposed interlocutory action is to be taken, it amounted to a denial of the plaintiffs' rights, as well as a practical stay of any proceedings to enforce their mortgage. Thus the order of the court, call it what you may, was a final determination which practically denied the plaintiffs their rights or any remedy to enforce them.

If it be said that this fact will be ascertained by the plaintiffs before the final settlement of their account, the question at once arises, if every mortgagor can absolutely stay proceedings until that time, how it will be possible for the receivers to ascertain the amount which they will receive upon such mortgage debts, or to determine the amount of any dividend belonging to the defendants. If the court may stay the proceedings in this action until that time, it may in every other, and, hence, render such an accounting impossible and the stay perpetual.

Had the judgment in this case actually adjudged that the plaintiffs were not entitled to recover upon the ground that the defendants were entitled to the amount of the dividends upon their shares in the plaintiff association as a set-off or counterclaim against the plaintiffs' right of action, that it was impossible to ascertain that fact, and upon that ground awarded the defendants a judgment dismissing the complaint, it could not be contended for a moment that the judgment was not so far final as to give the court jurisdiction to set it aside as the result of a mistrial. Such being the effect of the determination appealed from, it can hardly be said to be interlocutory when it is practically the same as though the complaint had been dismissed.

In *Moulton v. Cornish* (138 N. Y. 133, 143), which was an action in the nature of a strict foreclosure, this court, in discussing the rights of a subsequent mortgagor, among other things, said: "The right to a judicial sale of the mortgaged property to pay the mortgage debt, is in this state one of the incidents of the mortgage contract; and if the mortgagor is in default, the mortgagee is entitled to the enjoyment of this right unimpaired." "This right is so important, in these

cases, that the holder of the mortgage cannot be deprived of it, without, at the same time, very sensibly impairing and depreciating the security created by the mortgage. And as such it is an essential attribute of property, which positive legislation, even, cannot destroy without impairing the obligation of the contract out of which it arises." (*Peabody v. Roberts*, 47 Barb. 91, 95.) In the *Moulton* case it was further said: "It is not necessary to hold that in no case can the right to sell be held in abeyance; but the right cannot be denied, or suppressed unless some adverse dominating equity requires it. * * * It is not a matter of discretion with the trial court whether a remedy of this kind shall be applied. The proofs must bring the case within the exceptional class in which it is permitted, and then the measure of the relief to be granted or the conditions upon which it will be allowed are, to a certain extent, discretionary."

So we say in this case that the plaintiffs were entitled to a sale of the premises to secure the payment of their mortgage debt, and that they could not be deprived of it, unless some adverse dominating equity required it and the proofs brought the case within the exceptional class. In this case there was no such proof, but, on the contrary, it being a conceded fact that the amount due from the association to the defendants could not be ascertained until the final accounting of the receivers, which must, of necessity, follow the ascertainment of the amount of the assets which would come into their hands, there could be no equity which would justify the court in practically holding up the settlement of the estate by refusing to enforce its claims against mortgagors upon the theory that there might be some amount which, upon such final settlement, would become due and should be paid or allowed to such mortgagors.

We, therefore, reach the conclusion that the determination of the Appellate Division and of the trial court must be set aside and a new trial granted, to the end that the trial court may ascertain the amount, if any, due upon such mortgage independently of any dividends which cannot be ascertained

N. Y. Rep.]

Statement of case.

to which the defendants may be entitled upon the final settlement of the receivers' account, but without prejudice to the defendants' rights to enforce such dividends to the same extent and with the same effect as though this action had not been brought, with costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ., concur.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DELBERT H. DECKER, Appellant, v. EDWARD McCUE et al., Composing the Board of Assessors of the City of New York et al., Respondents.

NEW YORK (CITY OF) — WHEN ASSESSMENTS OBJECTED TO MUST BE REVIEWED BY BOARD OF REVISION OF ASSESSMENTS. Under section 950 of the charter of the city of New York (L. 1897, ch. 378) where an assessment is made by the board of assessors and objections thereto are interposed in writing, and the assessment is not altered so as to satisfy the objectors, the board has no power to declare the assessment confirmed, but under section 944 it is its duty to present such objections with the proposed assessment to the board of revision of assessments for its review.

People ex rel. Decker v. McCue, 74 App. Div. 40, reversed.

(Argued January 6, 1903; decided January 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 2, 1902, which dismissed a writ of certiorari to review the action of the board of assessors of the city of New York in imposing a local assessment for the expense incurred in the improvement of Flatbush avenue in the borough of Brooklyn.

The facts, so far as material, are stated in the opinion.

Edward M. Bassett and *W. W. Thompson* for appellant. The board of assessors of the city of New York had no power to confirm this assessment. (L. 1889, ch. 161; L. 1894, ch. 356; L. 1896, ch. 641; L. 1897, ch. 378, §§ 5, 943, 944,

945, 950; L. 1882, ch. 410, § 871; *Matter of Munn*, 165 N. Y. 153.) The board of assessors had no jurisdiction to confirm the assessment in question unless it was specifically and clearly granted by statute. (*E. Ins. Co. v. Mayor, etc.*, 153 N. Y. 331, 339; *Miller v. City of Amsterdam*, 149 N. Y. 288; *Beardslee v. Dolge*, 143 N. Y. 160; *McLean v. Jephson*, 123 N. Y. 142; *Hilton v. Fonda*, 86 N. Y. 339; *Matter of N. Y. C. Protectory*, 77 N. Y. 342; *Nat. Bank of Chemung v. City of Elmira*, 53 N. Y. 49; Cooley on Taxn. [2d ed.] 418, 609; Cooley on Const. Lim. [3d ed.] 74, 78, 517, 522; 25 Am. & Eng. Ency. of Law [1st ed.], 246; *Matter of Embury*, 19 App. Div. 214; 154 N. Y. 746; *People v. Featherstonhaugh*, 172 N. Y. 112.)

George L. Rives, Corporation Counsel (James McKeen of counsel), for respondents. The board of assessors had the power to complete this assessment and dispose of the objections without reference thereof to the board of revision of assessments. (L. 1889, ch. 161; L. 1894, ch. 356; L. 1897, ch. 378, §§ 5, 942, 943, 1609, 1614.)

MARTIN, J. The improvement under consideration was commenced in 1889 and completed about 1901. In the meantime bonds had been properly issued for the cost thereof, the town of Flatbush had been annexed to the city of Brooklyn, and the latter city had become a part of the greater city of New York. Until the town of Flatbush became a part of the city of New York no assessment district had been fixed. In 1901 the board of assessors of that city fixed such district and established the amount to be paid by the property owners. Objections in writing were interposed by the relator to the assessments thus made, and the board of assessors refused to change them, but they were confirmed. It is now contended that where objections in writing are presented the power to confirm assessments made by the board of assessors is vested in the board of revision of assessments. (N. Y. Charter, §§ 943-950.) If the relator's claim that, under the circumstances, the board of assessors had no jurisdiction to

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

confirm their own assessments and that that power was vested in the board of revision be correct, it follows that his contention must be sustained and the assessments must be transmitted to that board for revision. This involves a brief review of the various statutes relating to this subject.

In 1889 a statute was enacted which provided for the appointment of five persons as street and sewer commissioners of the town of Flatbush. Among other things they were empowered to improve Flatbush avenue and to issue bonds for the expense of such improvement. (L. 1889, ch. 161, §§ 8, 9.) All the expenses of such improvement were to be finally charged to a district of assessment, to be fixed by such commissioners, and levied and collected from the property in such district in the annual tax levies next after the completion of such improvement in ten annual installments, equal or nearly equal, to be fixed by such commissioners in such manner that the aggregate amount of such installments should pay the entire amount charged on such assessed district with interest until the time of the payment of the bonds to be issued therefor. (§§ 1, 2.) The commissioners were required to make a map showing the assessment district, to give ten days' notice of where the map was filed, of the amount to be charged and when persons could be heard in opposition to the district or amount. After hearing such objections, they could change or confirm the assessment, and their decisions were final.

Before the commissioners had completed the work and fixed the assessment district, the town of Flatbush was annexed to the city of Brooklyn, and a board consisting of the mayor, commissioner of city works of that city and the supervisor of Flatbush succeeded to the powers and duties of the five commissioners appointed under the act of 1889. (L. 1894, ch. 356.) Again, before this last board had fixed the assessment district, its powers were vested in the commissioner of city works of the city of Brooklyn, and the other provisions of the two previous acts in regard to this improvement were continued in force. (L. 1896, ch. 641.) This situation continued until January 1, 1898, when the charter of Greater

New York went into effect, which abolished the office of commissioner of city works of the city of Brooklyn. (Charter, § 1615.) That statute, however, contained no provision expressly conferring the duties and powers of that officer, in regard to this improvement, upon any officer or board in the new city. But it provides that all laws, or parts of laws, previously passed creating any debt or debts of the municipal and public corporations thus united and consolidated should remain in full force and effect, except that they should be carried out by the corporation of the city of New York, and under such name and in such form and manner as may be suitable to the administration of such city, and that all assessments for benefits theretofore laid or provided to be laid, should be preserved and enforced. (§ 5.) It also provides for the appointment by the mayor of a board of assessors composed of five persons, whose duty it is to make all assessments for local improvements in any part of the city as thereby constituted, other than those required by law to be confirmed by a court of record (§ 943); and that when that board has completed any proposed assessment it is its duty to give notice thereof to the owners, and to publish such notice successively for ten days, the notice to describe the limits of the assessment district, and to contain a request for persons affected by the assessment and opposed thereto, to present objections in writing, and if, after hearing and examining such objections and testimony, the assessors shall not deem it proper to alter their assessment, or having altered it there shall still be objections to it, it shall be their duty to present such objections with the proposed assessment to the board of revision of assessments. (§ 950.) The comptroller, corporation counsel and president of the board of public improvements are made the board of revision of assessments. This board is vested with full power over the revision and confirmation of assessments specified in the various laws and ordinances relating to assessments in any part of the city of New York as thereby constituted, other than assessments made by commissioners appointed by a court of record,

and other than those confirmed by the assessment board. It is given power to consider objections on the merits, subpoena and examine witnesses, confirm assessments or refer them back to the board of assessors for correction. (§ 944.) The powers conferred by these sections of the charter are substantially the same as those conferred upon similar boards in the former city of New York, and those powers are expressly extended to the territory embraced in the present city. (§ 945.)

That under and by virtue of these various statutes the power to make the assessments in question devolved upon the board of assessors of the city of New York is not denied. The only contention of the relator is that upon his filing a written objection to the assessment made by such board, which did not change the assessment to his satisfaction, it was its duty to transmit the assessment to the board of revision for its action thereon. We think his contention must be sustained.

Although it is true that under the previous acts relating to this improvement, it was provided that the decision of the assessing officer or officers should be final, yet, as there is no such officer in existence under the law as it now stands, and as we find no existing statute providing that the assessment by the board of assessors of the city shall be final, except where there is no objection or the assessment is altered to the satisfaction of the objectors, and there is an express provision that under circumstances like those presented in this case it shall be the duty of the board of assessors to present such objections with the proposed assessment to the board of revision of assessments for its review, it is quite clear that the contention of the appellant must be sustained.

It follows that the order appealed from should be reversed, and the assessment sent to the board of revision of assessments to proceed thereon according to the provisions of law, with costs to the appellant.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, VANN and CULLEN, JJ., concur.

Order reversed, etc.

HENRY W. LEONARD, as Executor of ANTOINETTA HARNEY,
Deceased, Respondent, v. WILLIAM H. HARNEY, Appellant,
Impleaded with Others.

INSURANCE (LIFE)—WHEN THE PROCEEDS OF AN ASSIGNABLE POLICY BECOME A PART OF THE INSURED'S ESTATE. The title to a policy of life insurance issued by a company, which is neither a fraternal nor a mutual benefit association, to the insured "(the beneficiary under this policy) or to the legal representatives or assigns of said beneficiary," upon an application in which he directed that the insurance should be paid "to whom I may direct in my will," where he bequeaths to his wife the balance due on the policy after the satisfaction of a debt, to secure which it had been assigned, and appoints her executrix, vests in the widow, not as a beneficiary under the policy, but as executrix; as a specific legatee, however, she is entitled to the proceeds, except as against creditors of the estate.

Leonard v. Harney, 68 App. Div. 294, modified.

(Argued January 9, 1903; decided January 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered August 16, 1901, reversing a judgment in favor of defendant entered upon a decision of the court on trial at Special Term and directing judgment for plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion.

James E. Chandler for appellant. The learned trial justice correctly construed the words "legal representatives" as they are found in the policy under review, by giving to those words their ordinary signification. (*Sulz v. M. R. F. L. Assn.*, 145 N. Y. 563; *Dannhauser v. Wallenstein*, 169 N. Y. 199; *Hight v. Sackett*, 34 N. Y. 447; *Matter of Knoedler*, 140 N. Y. 377.) The policy in question not being in any legal sense a wife's policy, was not exempt from the demands of creditors. (*Amberg v. M. L. Ins. Co.*, 171 N. Y. 314; *Blood v. Kane*, 130 N. Y. 514.)

James Stikeman and *Arthur M. Silber* for respondent. Plaintiff is entitled to the insurance according to the terms of

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

the policy. (*Griswold v. Sawyer*, 125 N. Y. 411; Code Civ. Pro. § 2713; *Vedder v. Saxton*, 46 Barb. 188.) Plaintiff is entitled to the insurance according to the terms of the application and the will. (*Griswold v. Sawyer*, 125 N. Y. 415.)

CULLEN, J. The Provident Savings Life Assurance Society in 1887 issued to William A. Harney, deceased, an insurance policy on his life whereby on proof of death it promised to pay "to William A. Harney (the beneficiary under this policy) or to the legal representatives or assigns of said beneficiary" the sum of ten thousand dollars. In the application for the policy in answer to the question "name in full of the beneficiary for whose benefit the insurance is applied for," Harney wrote "to whom I may direct in my will." He subsequently assigned this policy as collateral security for the payment of a debt of about \$7,300. By his will he bequeathed to his wife, the respondent's testator, the balance or surplus due on the policy after satisfaction of the debt to secure which it had been assigned, and appointed her executor of the will. On Harney's death his widow demanded in her personal right the surplus due on the policy. The defendant, claiming that he was a creditor of the deceased, notified the insurance company not to pay it to her. Thereupon the insurance company brought an action of interpleader against Mrs. Harney personally and the defendant, but did not make the former a party to that action in her representative capacity. The insurance company paid the money into court and dropped out of the action, which was continued between Mrs. Harney and the defendant. The trial court rendered judgment dismissing the complaint, holding that the fund belonged to the estate of the deceased, but did not award its possession to any person. The Appellate Division reversed the judgment of the Special Term and granted final judgment awarding the fund to the plaintiff.

We think the learned Appellate Division erred in its view as to the title to the policy and that the plaintiff can claim the

insurance moneys only as legatee under the will of her husband, not as beneficiary under the policy. The case is not at all similar to that of *Griswold v. Sawyer* (125 N. Y. 411). In that case the policy was payable "to his (the insured's) legal representatives ninety days after due notice and satisfactory evidence" of his death. It was held that under the surrounding circumstances the term "legal representatives" was to be construed as meaning his children and questionably his widow, not his administrator or executor. In the present case the contract is to pay the deceased, his personal representatives or assigns. Not only was the policy by its terms assignable by the insured, but as a matter of fact he assigned it, a fact wholly inconsistent with title in any other person than him. This is very clearly pointed out by Judge EARL in the case of *Griswold v. Sawyer* (*supra*), the principal ground on which that case proceeded being the omission of the word "assigns" in the policy. The learned judge wrote: "The word 'assigns,' which is usually found in policies which are assignable by the insured, is also omitted from this policy, indicating that the parties did not understand that they were dealing with an assignable policy. It is elementary law that where a policy is for the benefit of persons named therein to whom the sum insured is payable, it cannot be assigned without the consent of the persons named and all of them. The insured may destroy the policy by omitting to pay the premiums and thus failing to keep it in life, but he cannot impair the interests of the persons named as beneficiaries by a surrender or assignment thereof." The ordinary meaning of the term "personal representatives" is executors or administrators, and there is nothing even in the application of the insured for the policy to give that term a different construction. He asked that a policy be issued payable to the person he may nominate in his will. It might be sufficient answer to say that such is not the policy the insurance company elected to issue to him. But, aside from that consideration, a policy which was at all times to be assignable by the deceased, and the beneficiary of which was to be desig-

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

nated only by his will, an ambulatory instrument, susceptible of revocation or change, taking effect only on his death, would necessarily be the property of the deceased and part of his estate. Of course, these remarks do not apply to insurance in fraternal or mutual benefit organizations, where the statute prescribes a different rule.

The plaintiff's title was, therefore, only that of legatee, but as a specific legatee she was entitled to the fund except as against creditors of the estate of the deceased. The learned trial court did not find that the defendant was a creditor of the deceased, nor does the evidence establish that fact. The Appellate Division was, therefore, right in reversing the judgment, but it should not have awarded final judgment for the plaintiff, since it might be that on another trial the defendant could establish his claim. It follows that the judgment appealed from must be modified so as to grant a new trial of the action.

It appears from the opinion of the Appellate Division, referring to the affidavits used on a motion to dismiss the appeal to that court, that pending that appeal the respondent's testatrix, as executor of the will of her deceased husband, had recovered the fund in suit. There can be no question as to the propriety of that recovery, and in the administration of the estate of the insured the rights of all parties will be protected. It would seem, therefore, that the litigation now before us is unnecessary, and we regret that in the present state of the record it is not within our power to finally dispose of the action, the expense of which, in proportion to the amount involved, must bear heavily on the parties. As this is an equity action, the costs are in our discretion. We, therefore, direct that the costs of this appeal abide the final award of costs in the action. It will thus be within the power of the Supreme Court to relieve the parties from the costs of the litigation by discontinuance or otherwise.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and VANN, JJ., concur.

Ordered accordingly.

173	356
173	572

LOTTIE G. DIMON, as Administratrix of HENRY G. DIMON, Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant, Impleaded with Others.

1. TRIAL — IMPROPER SUMMING UP OF COUNSEL. Upon the trial of an action, if the summing up passes beyond the bounds of legal propriety, it is the duty of counsel to object specifically and point out the language deemed objectionable, requesting the court to rule on the objection and except to the ruling if adverse; the refusal of the court to admonish counsel to desist and direct the jury at the proper time to disregard improper statements of counsel is also a proper ground for exceptions.

2. APPEAL — QUESTION NOT RAISED BELOW. An objection that the summing up of counsel upon the trial of an action was improper in that it was not confined to the evidence, but was an inflammatory appeal to the passions and sympathies of the jury, which resulted in an excessive verdict, cannot be considered on appeal to the Court of Appeals where the record presents no proper exception raising it.

Dimon v. N. Y. C. & H. R. R. Co., 74 App. Div. 626, affirmed.

(Argued January 20, 1903; decided January 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 23, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John F. Brennan and *Charles C. Paulding* for appellant. The summing up was not confined to the evidence, but was an inflammatory appeal to the passions based on no evidence. (*Williams v. B. E. R. Co.*, 126 N. Y. 96; *People v. Muller*, 167 N. Y. 247; *People v. Fielding*, 158 N. Y. 542; *Keiley v. G. L. Ins. Co.*, 57 N. Y. 638; *Halpern v. N. R. Co.*, 16 App. Div. 98; *Vogeder v. Becker*, 38 App. Div. 380; *Stewart v. M. S. Ry. Co.*, 72 App. Div. 459; *Cossel-*

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

mon v. Dunfee, 172 N. Y. 507; *Evans v. Lorillard*, 19 N. Y. 299.)

J. Addison Young and *C. H. Young* for respondent. The summing up of plaintiff's counsel presents no legal error for review by this court. (*Williams v. B. E. Ry. Co.*, 126 N. Y. 96; *Koelges v. G. L. Ins. Co.*, 57 N. Y. 638; *McKeever v. Weyer*, 11 Wkly. Dig. 258; *People v. Fielding*, 158 N. Y. 547.) This court is without power to review the determination as to the amount of damages awarded. (*Link v. Sheldon*, 136 N. Y. 1.)

BARTLETT, J. This action was brought by the administratrix of the estate of Henry G. Dimon, deceased, to recover damages for the alleged negligent killing of the intestate in the Park avenue tunnel collision on the 8th day of January, 1902.

At the opening of the trial the defendant, The New York Central & Hudson River Railroad Company, stipulated that the intestate was a passenger on the train, and died from injuries received in a collision, and that the company was solely responsible in damages, and that intestate was guilty of no carelessness contributing thereto.

The plaintiff proved the business character and earning capacity of the intestate, and the defendant put in no proofs.

The jury rendered a verdict for sixty thousand dollars. The Appellate Division affirmed the judgment entered upon this verdict with a divided court and without opinion. The defendant appealed from this judgment of affirmance, and presents to this court a single question of law.

In substance the position of the appellant is that, under the stipulation of the defendant, admitting its liability, the trial of this cause was confined to an assessment of the damages resulting to the widow and next of kin from the death of the intestate; that the summing up of counsel was not confined to the evidence, but was an inflammatory appeal to the passions and sympathies of the jury, and based on no evidence.

It is argued that the necessary result of the summing up was to inflame the minds of the jury, excite their sympathies and compel an excessive verdict.

This court, as defendant concedes, has no power to consider the question of excessive damages, and if the Appellate Division fails to exercise its ample powers in the premises, the result is final. (*Link v. Sheldon*, 136 N. Y. 1, 5; *Gale v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 594; *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 N. Y. 310, 321.)

After trial and verdict, we are confined to questions of law duly raised by exception.

A careful examination of this record discloses no proper exception which permits us to pass upon the character and tendency of the closing address of plaintiff's counsel to the jury.

If the summing up passes beyond the bounds of legal propriety in the judgment of defendant's counsel it is the duty of the latter to object, specifically, and point out the language deemed objectionable, requesting the court to rule on the objection, and except to the ruling if adverse.

The court should also be requested to admonish counsel to desist from such infraction of the rule and direct the jury at the proper time to disregard improper statements of counsel. (*Crumpton v. United States*, 138 U. S. 361.) The refusal of the court to so admonish counsel and instruct the jury is proper ground for exception.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., HAIGHT, MARTIN, CULLEN and WERNER, JJ., concur; VANN, J., absent.

Judgment affirmed.

JAMES N. VEAZEY, Appellant, v. HENRY ALLEN et al., as Copartners under the Firm Name of HENRY ALLEN & Co., Respondents.

1. APPEAL — NONSUIT. The dismissal of the complaint after the plaintiff had rested in an action to compel an accounting for profits alleged to have been made by the defendants in speculating in the stock of a corporation, part of which profits by certain agreements were alleged to belong to the plaintiff, "upon the ground that each of the agreements set forth in the complaint was and is contrary to public policy and void, and that the plaintiff, therefore, has no cause of action against the defendants upon either of said agreements," is a nonsuit, and the plaintiff is entitled to have it reviewed in the light of the facts and inferences most favorable to him.

2. CONTRACT — AGREEMENT FOR PROCUREMENT OF LEGISLATIVE ACTION FOR THE PURPOSE OF DEPRECIATING PRICE OF CORPORATE SECURITIES VOID AS AGAINST PUBLIC POLICY. A contract which contemplates the procuring of legislative action for the sole purpose of depreciating the market value of the securities of a corporation and provides that any profit, arising from speculating in such securities by selling them short and covering at the anticipated decline, is to be divided between the parties, is void as against public policy and will not be enforced by the courts.

Veazey v. Allen, 61 App. Div. 119, affirmed.

(Argued October 13, 1902; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 24, 1901, affirming a judgment in favor of defendants entered upon the report of a referee.

In this action the plaintiff seeks to compel the defendants to account to him for certain profits alleged to have been made by the latter in speculating in shares of the capital stock of two corporations known as the Distilling & Cattle Feeding Company and the American Sugar Refining Company. The defendants were copartners engaged as stockbrokers under the firm name of Henry Allen & Company, in the city of New York. The plaintiff's claim, briefly stated, is that the defendants, in consideration of his supplying them with infor-

mation concerning an investigation into the affairs of the corporations referred to, which he was to procure to be made by the United States Congress, would sell the stocks of those corporations, buy them again at a lower price, the decline in price being caused by the congressional investigation, and divide with him the profits so made. At the end of the plaintiff's case the referee, before whom the case was tried, upon motion of counsel for the defendants, dismissed the complaint on the ground that the contracts set forth therein were void as against public policy. The Appellate Division has affirmed the judgment entered upon that decision.

In 1891 the Distilling & Cattle Feeding Company was organized. This corporation was commonly known as the "Whisky Trust." Its chief business was the manufacture and sale of alcoholic liquors. It appears from the record that this company, instead of manufacturing these liquors by the ordinary processes, made them by mixing white spirits with various essences, syrups, oils and other deleterious substances in such a way that liquor of any kind, color and apparent age could be produced upon demand. Its business was soon extended over a great part of this country, being transacted through distributing agents located at various commercial centers. These agents sold the products of the company on what was called a rebate plan, which consisted in selling to customers on an agreement that if they would not deal in goods of any other concern which competed with the Whisky Trust, they would receive a rebate or discount upon the price paid at the end of six months. This manner of transacting business soon became a serious menace to the business of those concerns which dealt in what was known as "straight goods," that is, manufacturers of alcoholic liquors manufactured and disposed of in the ordinary way. Its effect was also to throw many traveling men, employed by independent competitors, out of employment. In the language of the plaintiff "it had driven many men off the road."

At that time the plaintiff was employed as a traveling salesman by the firm of Tullidge & Co. of Cincinnati, who were

N. Y. Rep.]

Statement of case.

manufacturers of "straight" whisky. He and his employers were interested in checking the growth of the business of the "Whisky Trust" and shutting it out of the market. Plaintiff had been connected with the whisky business for a number of years, and had also been in the essential oil business, and was thoroughly conversant with the details of both. Almost from the inception of the so-called Whisky Trust he had been agitating the question of how to check its encroachments upon the business of the dealers in "straight goods." He had consulted with many persons upon the subject, and had been considering the plan of going to Washington to see if he could accomplish his object through the Federal authorities.

In 1892 the plaintiff became acquainted with Judge Veazey, a member of the Interstate Commerce Commission, and his son-in-law Walton. During that year plaintiff discussed with Walton the subject of a congressional investigation into the affairs of the "Whisky Trust," and the probable effects of such an investigation upon the price of the stock of that corporation. Walton suggested to plaintiff that there might be some pecuniary benefit to plaintiff from such an investigation, and that he could introduce him to some persons in New York who could help him. In pursuance of this suggestion the plaintiff went to New York and was there introduced by Walton to a lawyer by the name of Flagg. The latter told plaintiff that there would probably be an opportunity to make considerable money out of the decline of the Distilling & Cattle Feeding Co.'s stock, providing that the representations he made in regard to that company and its methods were true; that they should be exposed, and that he thought it would be well for the plaintiff to consult some broker in New York. Soon after this conversation, which took place at Flagg's house, and on January 5th, 1893, the latter introduced the plaintiff to the defendant Allen at the New York Club. Plaintiff told Allen that he thought he would bring about a congressional investigation into the affairs of the Distilling & Cattle Feeding Co., and that he would furnish him with all information in connection with that investigation that would

tend to affect the stock of that company. Allen asked for information concerning the company and plaintiff told him about its operations. Allen replied that if the facts regarding the operation of the business of the trust were as represented by the plaintiff and proven and publicly developed it would undoubtedly result in seriously affecting the market value of that stock on the stock market, and he suggested that there would be an opportunity for the plaintiff to make some money in giving him information relative to the possible action taken in Washington. Allen requested plaintiff to furnish him with any information he had or that might come to his knowledge affecting or tending to affect in any way the value of the stock of the Distilling & Cattle Feeding Co. Plaintiff thereupon asked Allen how he proposed that plaintiff should make any money. Allen replied that if the plaintiff would furnish him with information regarding that matter, when they proposed to introduce the resolution and any subsequent steps that were taken in that matter in Washington that he would sell 3,000 shares of the stock of that company when they were ready to begin investigation over there, without requiring plaintiff to put up any margin, and that Allen would return to the plaintiff the profits which would accrue from the sales of such stock. Plaintiff accepted this proposition and testified that Allen stated to him that in making it he was acting on behalf of the firm of Henry Allen & Co. Plaintiff thereupon proceeded to Washington, where he was introduced to Mr. Burrows, a member of the house of representatives, through Judge Veazey and Walton. He succeeded in interesting Mr. Burrows in the matter by fully informing him of the methods employed by the Distilling & Cattle Feeding Co. in conducting its business, and demonstrated to him by actual experiments its method of producing different kinds of liquors by the use of the deleterious essential oils and compounds above described. Plaintiff talked with other members of Congress, and through his efforts Mr. Burrows, on January 13th, 1893, introduced a resolution in the Federal house of representatives calling for an investigation into the affairs of the

N. Y. Rep.]

Statement of case.

Distilling & Cattle Feeding Co. This resolution was finally referred to a sub-committee of the judiciary committee of the house, before which hearings were had, commencing on February 4th and continuing at intervals until February 27th, 1893, when the last hearing was had. Plaintiff appeared as a witness before the sub-committee and there gave testimony in connection with which he again demonstrated by actual experiments the methods employed by the Distilling & Cattle Feeding Co. in producing its goods and described its mode of conducting its business. He not only appeared as a witness himself, but suggested the names of other witnesses, attended during nearly all the hearings, supplied information to the committee from time to time, and did what he could to promote and continue the investigation. He was in fact the prosecuting witness and was referred to as such by the chairman of the sub-committee.

Subsequent to the introduction of the resolution authorizing the congressional investigation it was amended so as to give the committee power to investigate the affairs of all "trusts" doing business in restraint of trade, and under this amendment the affairs of the American Sugar Refining Company were inquired into somewhat and plaintiff suggested witnesses and took some part upon this branch of the inquiry. In a letter written June 27th, 1893, to the president and governing committee of the New York Stock Exchange, the plaintiff stated that pursuant to his agreement with Allen he had instituted this investigation and, at his own expense and by his own efforts, had furnished the testimony for the investigation, with the result that there was an immediate fall in price of the stock of said corporation. In the same letter the plaintiff stated that after January 17th, 1893, he and Allen agreed to proceed upon the same basis against this stock; that further efforts were made by him, resulting in a further decline of the stock and that on the 1st of February, 1890, the arrangement was continued as before. Again in the same letter the plaintiff stated that during the month of February (1893) a heavy decline occurred in said stock and that Mr. Allen then desired

him, in addition, to aid in breaking the market in sugar and would give him one-half the profits which might result from the effort; that pursuant to this agreement he set such measures at work as were necessary, with the result that sugar declined heavily.

The record shows that between the date of plaintiff's going to Washington, about January 5th, 1893, and March 7th following, he was in almost constant communication with the defendants by telegraph, telephone, mail and personal interviews. In some of his telegraphic dispatches he used a cipher code furnished him by defendants. From these communications it appears that plaintiff kept the defendants well supplied with information concerning the success of his efforts in bringing about the investigation and the progress of the proceedings before the sub-committee, both in regard to the affairs of the Distilling Company and the American Sugar Refining Company. Many replies to these communications were received by him from the defendants, advising him of the condition of the stock market and requiring further information. On January 17th, 1893, plaintiff received a letter from Allen inclosing a certificate of deposit for the sum of \$6,237.50 for himself and Walton, whom the plaintiff had employed to aid him in his operations. This letter stated that the amount inclosed was the profit on the operations in the stock of the Distilling & Cattle Feeding Co. On or about February 1st, 1893, plaintiff received from Allen personally a further sum of \$10,700.00.

After the first agreement of defendants to sell 3,000 shares of the stock of the Distilling Company for plaintiff's benefit as above set forth, and on or about January 17th, defendants entered into another agreement with plaintiff to sell 3,000 more shares of stock on the same terms. On or about February 1st, 1893, the defendants entered into a further agreement with plaintiff by which he was to receive one-half of the profits made by them in their operations, not only in the stock of the Distilling Company, but also in the stock of the American Sugar Refining Company. It is admitted that the

N. Y. Rep.]

Statement of case.

defendants on the 13th and 14th of January, 1893, sold 3,000 shares of the Distilling Company's stock, and on the 24th and 25th of the same month they sold 3,000 shares more of the same stock, and that 6,000 shares were purchased between January 16th and 31st. It is also admitted that the defendants had transactions in the stock of the American Sugar Refining Co. between February 1st and March 4th, 1893.

The complaint set forth four separate causes of action. The first cause of action sets forth the facts relating to the sale by the defendants for the plaintiff's benefit of the 3,000 shares of stock of the Distilling & Cattle Feeding Company, and it is alleged that the \$6,237.50 received by plaintiff did not represent all the profit arising therefrom. The second relates to the sale of the second 3,000 shares of the same stock and alleges that the \$10,700.00 received by plaintiff did not represent all the profit on such sale. The third relates to the further operations of the defendants in the same stock wherein plaintiff was to have one-half of the profits which are claimed to have amounted to upwards of \$500,000.00. The fourth is in substance the same as the third, except that it relates to the operations in the stock of the American Sugar Refining Company. The answer puts in issue all the material allegations of the complaint. As separate defenses it sets up settlement of accounts and payment and that the contracts set forth in the complaint are illegal and void because they contemplated an agreement by plaintiff to solicit and influence members of Congress to pursue an investigation into the affairs of the Distilling & Cattle Feeding Company in which plaintiff's sole object was to cause a decline in the value of the stock of that company.

Sidney G. Stricker, Herbert R. Limburger, Edward Lauterbach and Edgar M. Johnson for appellant. The judgment is a mere nonsuit. Consequently the only question is whether there was any evidence to support a cause of action, and the evidence to support a cause of action being ample and complete, the judgments below must be reversed.

(*Place v. Hayward*, 117 N. Y. 487; *Raabe v. Squier*, 148 N. Y. 81; *Bliven v. Robinson*, 152 N. Y. 333; *Ware v. Dos Passos*, 162 N. Y. 281; *Scofield v. Hernandez*, 47 N. Y. 313; *Forbes v. Chichester*, 125 N. Y. 769; *Woodbridge v. F. Nat. Bank*, 166 N. Y. 238; *D. & C. F. Co. v. People*, 156 Ill. 448; *White v. Drew*, 56 How. Pr. 53.) The agreements sued upon were legal, and it was error to hold them void as against public policy, for the reasons that: The contracts did not contemplate the use of any unlawful means on the part of Veazey in persuading Congress to investigate the Whisky Trust. Nor did the fact that Veazey was to be paid in profits to be made by selling stocks short vitiate the agreement. Nor was the investigation sought for any unlawful purpose, the object of the investigation being merely to elicit the truth regarding the practices of the Whisky Trust. (*Dowley v. Schiffer*, 13 N. Y. Supp. 552; *Ormes v. Dauchy*, 82 N. Y. 443; *Maloney v. Nelson*, 12 App. Div. 545; *Curtis v. Gokey*, 68 N. Y. 300; *Chesebrough v. Conover*, 140 N. Y. 382; *Dunham v. H. P. Co.*, 56 App. Div. 244; *Southard v. Boyd*, 51 N. Y. 177; *Cummins v. Barkalow*, 1 Abb. Ct. App. Dec. 479; *Trist v. Child*, 21 Wall. 441; *D. & C. F. Co. v. People*, 156 Ill. 448.)

Charles F. Brown, *Charles H. Brush* and *John J. Crawford* for respondents. The agreements testified to by the plaintiff were contrary to public policy, and void. (*Campbell v. Seaman*, 63 N. Y. 568; *Cogswell v. N. Y. C. & H. R. R. Co.*, 103 N. Y. 10; *Bohan v. P. J. G. L. Co.*, 122 N. Y. 18; *Booth v. R., W. & O. R. R. Co.*, 140 N. Y. 267, 274; *Dunham v. H. P. Co.*, 56 App. Div. 244; *Barry v. Capen*, 151 Mass. 999; *Greenhood on Pub. Policy*, 194; *Freeman v. Stone*, 42 Barb. 169; *Adams v. Page*, 7 Pick. 541; *Lumley v. Guy*, 2 E. & B. 216; *Oscanyan v. Arms Co.*, 103 U. S. 261.) The appellant's contention that the judgment appealed from is one of nonsuit only, and that it must be reversed if there is any evidence to sustain the plaintiff's contention, is wholly unimportant upon this appeal. (*Gray v. Hook*, 4

N. Y. Rep.] Opinion of the Court, per WERNER, J.

N. Y. 449.) The contracts sued upon being illegal, no recovery can be had thereon, and the complaint was properly dismissed. (*Marshall v. B. & O. R. R. Co.*, 16 How. [U.S.] 153; *Tool Co. v. Norris*, 2 Wall. 49; *Hunt v. Hunt*, 40 N. Y. 543; *Planters' Bank v. Union Bank*, 16 Wall. 483.)

WERNER, J. Before proceeding to discuss the question whether the contract, under which the plaintiff makes his claim, is void as being repugnant to public policy, it may be well to fix the point of view from which it is to be considered. The learned counsel for the appellant asserts that it makes a vital difference in the case whether the referee's decision is to be regarded as a determination upon the merits, or whether it is to be treated simply as a nonsuit. It appears that after the plaintiff had rested his case, counsel for the defendants moved for a dismissal of the complaint on various grounds, one of them being that the contract testified to by the plaintiff was void as against public policy. After this motion had been made and discussed, the referee twice adjourned the further hearing of the case, when he made his decision in the short form, in which he finds and decides "that the defendants are entitled to judgment herein against the plaintiff dismissing the plaintiff's complaint," and directs judgment accordingly, "upon the ground that each of the agreements set forth in the complaint was and is contrary to public policy and void, and that the plaintiff, therefore, has no cause of action against the defendants upon either of said agreements." As the "agreements" referred to in the decision are all of the same character and involve but one question, we shall refer to it as a single contract.

In form, and according to the decided cases, the referee's decision was simply a nonsuit, and the plaintiff is entitled to have it so treated. (*Scofield v. Hernandez*, 47 N. Y. 313; *Place v. Hayward*, 117 N. Y. 487; *Raabe v. Squier*, 148 N. Y. 81.) Such a decision gives a defeated plaintiff the right to have it reviewed in the light of the facts and inferences most favorable to him. In the case at bar this question

is one of form rather than substance because, in either event, the ultimate question to be decided is whether the contract made by the parties under the conditions and circumstances testified to by the plaintiff is valid or void.

This contract is assailed on the ground of public policy. Lord BROUGHAM defined public policy as "that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law." In many of its aspects the term "public policy" is but another name for public sentiment and, as that is often transitory or shifting, it lacks the permanency upon which fixed principles of law are, or should be, based. There are, however, other phases of public policy which are as enduring and immutable as the law of gravity. One of them is that, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare. That sound morality and civic honesty are corner stones of the social edifice is a truism which needs no re-enforcement by argument. It may, therefore, be taken for granted that whenever our courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for a well-fitting definition of public policy, nor hesitate in its practical application to the law of contracts. This is no new doctrine, for it was the law in the time of Lord Chief Justice WILMOT, when he said, "It is the duty of all Courts of Justice to keep their eye steadily upon the interests of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public and which has a bad tendency to give it no countenance or assistance in *foro civili*." (*Low v. Peers*, p. 378, Wilmot's Notes.)

Let us now look at the contract which the plaintiff seeks to enforce in this action. It is, in effect and substance, a contract to pay the plaintiff the whole, or a part, of the profits

N. Y. Rep.] Opinion of the Court, per WERNER, J.

resulting from speculations in the stock of a corporation, undertaken by the defendants pursuant to advance information furnished them by the plaintiff, as to the probable course and developments of a congressional investigation into the affairs and methods of said corporation, instituted and encouraged by the plaintiff as a prosecuting witness, and in other ways. The investigation was intended to and did seriously impair the reputation of said corporation and resulted in a substantial decline in the market price of its stock. This was the end aimed at in said contract. The plan agreed upon between the plaintiff and the defendants contemplated the sale, at a given price, of stock which they did not have, but which they expected to be able to purchase at a lower price in consequence of the investigation referred to. The anticipated profit was to be the difference between the selling and purchasing price of the stock. The allegations of the complaint suggest the great extent to which the plaintiff believed he was to be benefited by the defendants' operations under this contract, and the answer admits enough to prove that plaintiff's interest in it was, at least, a substantial one. The fidelity and zeal with which the plaintiff performed his part of the contract is clearly shown by the voluminous telegraphic and written correspondence which appears in the record. In its final effect we have here a case in which it is alleged and proved that the consideration of the contract sought to be enforced is the fruit of a legislative investigation, instituted, prosecuted and encouraged by the plaintiff. That such a contract is one which, in its object, operation and tendency, is calculated to be prejudicial to the public welfare, ought not to be doubted for a moment. Why? Not because the plaintiff was in fact necessarily dishonest or corrupt in instituting and prosecuting the investigation; nor yet because the charges preferred against the offending corporation were not true, but because the plaintiff voluntarily acquired a pecuniary interest in the result of the investigation, which might subject not only him, but through him others, to the temptations and allurements which human experience

has proven to be potent in sacrificing sound morality and honesty to that greed and cupidity which not infrequently beget perjury, bribery and other moral delinquency, incompatible with the public weal.

But just here counsel for the plaintiff interjects the suggestion that he is entitled to all the favorable inferences that may be drawn from the testimony; that since his efforts to procure an investigation were begun before the making of the contract in suit it is not to be presumed that he was or could be improperly influenced, or that he would be led to improperly influence others, by the financial interest which he subsequently acquired in the results of the investigation. It is true that under the rule entitling the plaintiff to all the favorable inferences that may legitimately be drawn from the testimony, we must assume that plaintiff's first efforts to procure a legislative investigation of the corrupt and evil methods of the "Whisky Trust" were innocent and commendable, but it is equally true that before his laudable efforts had borne any fruit he changed his *status* from that of a disinterested citizen to that of an interested party. His original purpose, to protect and preserve the legitimate business with which he had long been identified, against the unlawful and insidious encroachments of an unscrupulous corporation, was commendable and worthy. Had he persevered in his first designs and motives their effect upon the public would have been above criticism. But favorable inferences cannot stand against positive testimony. It is in evidence that before the plaintiff's early efforts to obtain governmental aid had promised any results, he entered into the contract in suit. Over his own signature the plaintiff declared his inability to proceed without financial aid, and later on, in the same unequivocal manner, he admitted that pursuant to the contract under discussion he instituted the investigation, at his own expense and efforts furnished the testimony, and procured the result which eventuated in the profit which he now seeks to recover. It is, as the referee herein has well said, "the right of every citizen to petition a legislative body in respect to any existing

N. Y. Rep.] Opinion of the Court, per WERNER, J.

matter or condition of things within its jurisdiction, which may be prejudicial to his personal rights or interests, or which he may deem to be a public evil, and to lay before the body, by proper means and in a proper manner, the grounds of his complaint and his reasons for demanding its intervention."

Had the plaintiff maintained the attitude of such a petitioner he could not now be criticised. But when he has voluntarily abdicated that position for one in which his every movement is coupled with an interest that cannot be disassociated from ultimate gain or loss, depending in some degree upon the success of his own efforts, it is not difficult to see that he is no longer purely an advocate for the public good, but an interested party seeking to further his own ends by means that may be, if they are not in fact, immoral, corrupt and destructive of public welfare. Although there are no cases directly in point, we think the principle underlying these views is sustained by many authorities. In *Mills v. Mills* (40 N. Y. 546) the action was brought to enforce specific performance of a contract to convey land, the consideration for which was the plaintiff's agreement to give all the aid in his power * * * and to use his interest, influence and exertions to procure the passage of a law granting to the defendant and others the right to build and operate a railroad. In holding the contract void this court said: "It is not necessary to adjudge that the parties stipulated for corrupt action or that they intended that secret and improper resorts should be made. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action." In *Atcheson v. Malton* (43 N. Y. 147) it was held that an agreement between parties tending to lessen rivalry in bidding upon public work was void as against public policy, even though it did not appear that the agreement was actually detrimental to public interests. In *Richardson v. Crandall* (48 N. Y. 348) the plaintiff was engaged in furnishing men to fill the quotas of certain counties for military service under a call from the president. The defendant as provost marshal exacted from

the plaintiff a bond that the men furnished would not desert. It was held that any discretion which the provost marshal had should have been exercised, uninfluenced by the security exacted, and the taking of the pledge was, therefore, against public policy. To the same effect is *Tool Company v. Norris* (2 Wall. 54), where it was held that an agreement to procure from the government a contract for firearms was offensive to public policy and, therefore, void. So, a contract for "lobby services" to secure the passage of a bill providing for the payment of a claim, has been held void by the Supreme Court. (*Trist v. Child*, 21 Wall. 441.) In *Mequire v. Corwine* (101 U. S. 108) it was held that a contract between A and B, whereby the former agreed to secure the appointment of the latter as special counsel in certain government cases, and to assist him in the defense thereof, upon the consideration that A should have one-half of the fee received by B, was contrary to public policy. To the same effect is *Oscan-yan v. Arms Co.* (103 U. S. 261).

The authorities relied upon by the plaintiff appellant are distinguishable from the case at bar and those cited in support of the judgment herein. It is a fundamental principle of the common law that what a person may lawfully do for himself he may do through his agents and servants. Early in the history of this court that principle was applied to a contract by which one party agreed, for compensation, to aid another in prosecuting a claim against the state. This court said: "A party who has a claim against the State may employ persons to present and urge it, with proofs and arguments, before the tribunal authorized to act upon it. This is not within the principle which renders agreements to compensate a person for privately soliciting individual members of the legislature, or other public bodies, to act in favor of a claim or measure, void." (*Sedgwick v. Stanton*, 14 N. Y. 289.) Similar cases in the Supreme Court are *Russell v. Burton* (66 Barb. 539), and *Cary v. Western Union Tel. Co.* (20 Abb. N. C. 337). In *Chesebrough v. Conover* (140 N. Y. 382), which is strongly relied upon by the plaintiff, this court

N. Y. Rep.] Opinion of the Court, per WERNER, J.

reiterated the rule that "it is the right of every citizen interested in any proposed legislation to employ, and agree to pay, an agent to draft a bill, and fairly and openly to explain it to a legislative committee, or any member of the legislature, and ask to have it introduced; and a contract which does not call for more, and services under it which do not go further, are not against policy." In that case there was, however, a question of fact as to what the agreement was, and that question was fairly submitted to the jury under proper instructions. By their verdict for the plaintiff the jury decided that the contract was one for purely professional services, and it was in the light of this finding that the judgment was sustained, although this court took occasion to say: "If the plaintiff was employed to render what are commonly called lobby services in procuring legislation desired by the defendant, then he should have been defeated in his action. Such contracts are condemned as against public policy, and the rules applicable to them are laid down in many decisions." (Citing cases.)

The foregoing list of cases might be swelled by many others to illustrate the variety of conditions under which questions of public policy have had to be considered in determining the validity of contracts; but enough have been cited to show how different is the case at bar from all others that we have seen, and how obviously applicable to the contract in suit is the principle of public policy which forbids the enforcement of such contracts as may in their nature be injurious to the public. This is not the case of a person employed in a professional capacity to work openly and publicly in a matter of legislative concern, but of a man who agrees to furnish the testimony for a legislative investigation, in exchange for a share of the profits which such an investigation will produce to one who is favored with inside and advance information as to its probable progress and effect.

The judgment below should be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, JJ. (and CULLEN, J., in result), concur; BARTLETT, J., not voting.

Judgment affirmed.

JAMES J. BEGLIN, as Administrator of CATHERINE L. BEGLIN,
Appellant, v. METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

EVIDENCE — LIFE INSURANCE — RECORD OF BOARD OF HEALTH INADMISSIBLE TO SHOW CAUSE OF DEATH. The general statute requiring the registration of vital statistics and making the record *prima facie* evidence of the facts therein set forth (L. 1885, ch. 270, § 3, subd. 5) applies to questions arising under its provisions so far as they involve public rights, but does not change the common-law rule of evidence in controversies of private parties growing out of contracts; therefore, a copy of a record of a city board of health embodying vital statistics cannot be proved in an action upon a life insurance policy for the purpose of showing that a material statement made by an applicant for insurance as to the cause of her mother's death was false.

Beglin v. Met. Life Ins. Co., 57 App. Div. 629, reversed.

(Argued January 30, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 15, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Harold D. Alexander for appellant. The court erred in holding admissible the board of health record of the cause of Esther Horan's death. (Code Civ. Pro. § 834; *Davis v. Supreme Lodge*, 165 N. Y. 159; *Pease Co. v. Kesler*, 21 App. Div. 631; *Lawlor v. French*, 14 Misc. Rep. 497; *Weber v. Railway*, 12 App. Div. 512; *Robinson v. Sup. Com.*, 38 Misc. Rep. 104.)

John De Witt Peltz for respondent. The admission in evidence of the certified copy of the registered record of the board of health of the city of Albany, which proved, without contradiction, that the mother of the insured had and died of

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

consumption was proper. (*Hoyt v. Hoyt*, 112 N. Y. 493; *Stevens v. Brennan*, 79 N. Y. 254, 259; *Foley v. Royal Arcanum*, 151 N. Y. 204; *Woolsey v. Trustees of Ellenville*, 84 Hun, 236; 155 N. Y. 573; *Markowitz v. D. D., etc., Co.*, 12 Misc. Rep. 412; *Keefe v. Supreme Council*, 37 App. Div. 276; *People v. Denison*, 17 Wend. 312; *People v. Gray*, 25 Wend. 465; *Jacobi v. Order*, 73 Hun, 602; 1 Kent's Comm. [13th ed.] 448; *Van Bergen v. Bradley*, 36 N. Y. 316.)

HAIGHT, J. This action was brought to recover on a policy of insurance issued by the United States Industrial Company on the life of Catherine T. Beglin, and assumed by the defendant according to its terms. The policy was issued on the 10th day of April, 1897, and Catherine T. Beglin died on the 12th day of June, 1899.

The written application for insurance contained, among other questions, the following: "Has either parent or any brother or sister died of consumption or any pulmonary or constitutional disease?" To this question the applicant answered in the negative. Under the terms of the application the answers to questions were made warranties, and it is now claimed on behalf of the defendant that the answer made to that question was incorrect and that, therefore, the plaintiff cannot recover.

Upon the trial the defendant offered in evidence a certified copy of the records of the board of health of the city of Albany for the month of January, 1889, and this was followed by an offer of the original record. The receipt of these records was objected to upon the ground that they were hearsay. The objection was overruled and an exception was taken. The records were to the effect that Esther Horan, who was the mother of Catherine T. Beglin, died in the city of Albany on the 2d day of January, 1889, and that the chief cause of death was phthisis pulmonalis. This was the only testimony given as to the cause of death of the mother of the petitioner. Upon the trial the court found as a fact that the

mother of Catherine T. Beglin died of consumption, and that consequently her administrator could not recover upon the policy of insurance.

A question appears to have arisen in the court below as to whether the general statute relating to public health was in force in the city of Albany, or chapter 297 of the Laws of 1885, which was a local statute. We shall not stop to consider that question, but shall assume that the general statute was in force and that it required a registration of births, marriages and deaths, including the cause of death; and that this record was made *prima facie* evidence of the facts therein set forth. This statute was a police regulation, required for public purposes and became *prima facie* evidence so far as concerns questions arising under its provisions which involve public rights. But we think it was not the intention of the legislature to change the common law rule of evidence in controversies of private parties growing out of contract, and that the provisions of the statute should not be construed as applicable to such cases. This in effect was what we held in the case of *Davis v. Supreme Lodge, Knights of Honor* (165 N. Y. 159); also in *Buffalo Loan, Trust and Safe Deposit Co. v. Knights Templar and Masonic Mutual Aid Association* (126 N. Y. 450). The question here presented was elaborately discussed in the *Davis* case and we regard it as controlling upon the question now presented.

It follows that the record was improperly received for the purpose of showing the cause of death, and consequently the judgment of the Appellate Division and that of the trial court should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, CULLEN and WERNER, JJ., concur; O'BRIEN, J., absent.

Judgment reversed, etc.

MARY W. LIVINGSTON, Respondent, v. WILLIAM S. LIVINGSTON,
Appellant.

CONSTITUTIONAL LAW — JUDGMENT FOR ALIMONY CONSTITUTES PROPERTY OF WIFE OF WHICH SHE CANNOT BE DEPRIVED WITHOUT DUE PROCESS OF LAW — L. 1900, CH. 742, IN SO FAR AS IT AFFECTS PRIOR JUDGMENTS FOR ALIMONY, UNCONSTITUTIONAL. A final judgment granting a divorce and directing the defendant to pay a certain sum per year for the plaintiff's support and the education and maintenance of her children creates and vests substantial rights which constitute property of the plaintiff, of which she cannot be deprived without due process of law (Const. art. I, § 6); and a subsequent statute (L. 1900, ch. 742), permitting the court, upon the application of either party to an action, at any time after final judgment, whether heretofore or hereafter rendered, to annul, vary or modify a direction of such judgment requiring the defendant to provide for the education and maintenance of the children of the marriage and for the support of the plaintiff, is unconstitutional in so far as it attempts to confer a power upon the court to annul, or vary, valid and final judgments rendered before the enactment of the statute.

Livingston v. Livingston, 74 App. Div. 261, affirmed.

(Argued January 7, 1903; decided February 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 15, 1902, which reversed an order of Special Term modifying a judgment of divorce, previously entered, by reducing the amount of alimony to be paid by the defendant to the plaintiff.

The facts, so far as material, are stated in the opinion.

J. Van Vechten Olcott for appellant. The order appealed from is reviewable by this court. (*Wetmore v. Wetmore*, 162 N. Y. 503.) Section 1759, subdivision 2, of the Code of Civil Procedure, as amended by chapter 742 of the Laws of 1900, confers upon this court the power to grant the relief sought by this motion. (*Walker v. Walker*, 155 N. Y. 77.) A provision in a decree of divorce requiring the husband to pay the wife alimony does not constitute a vested right belonging to the wife and, therefore, the constitutionality of chapter 742, Laws of 1900, cannot be attacked on the ground that it impairs

a vested right. (2 Am. & Eng. Ency. of Law [2d ed.], 93; *Burr v. Burr*, 7 Hill, 207; *Wallingsford v. Wallingsford*, 6 H. & J. 485; *Romains v. Chauncy*, 129 N. Y. 566; *Sargent v. Sargent*, 3 N. B. N. 516; *Barclay v. Barclay*, 2 N. B. N. 552; *Maisner v. Maisner*, 62 App. Div. 286; *Barbour v. Barbour*, 46 Me. 9; *Talbot v. Talbot*, 14 R. I. 57; *Moore v. Mayor, etc.*, 4 Sandf. 456; 8 N. Y. 110; *Pratt v. Tefft*, 14 Mich. 191; *Hammond v. Pennock*, 61 N. Y. 145.) The constitutionality of chapter 742, Laws of 1900, cannot be attacked on the ground that it impairs the obligation of a contract. (*O'Brien v. Young*, 95 N. Y. 428; *State of Louisiana v. City of New Orleans*, 109 U. S. 285; *Morley v. L. S. & M. S. R. Co.*, 146 U. S. 162; *G. S. Bank v. Vil. of Suspension Bridge*, 159 N. Y. 362; *Matter of Green*, 55 App. Div. 475.) The constitutionality of section 1759, subdivision 2, of the Code of Civil Procedure cannot be attacked on the ground that in the amendment thereof the legislature has exercised judicial functions. (*Lynde v. Lynde*, 162 N. Y. 407.) The unconstitutionality of a statute must be clear and manifest before a court should declare it, so that where any reasonable doubt exists as to its constitutionality, it should be upheld. (*Ex parte McCollum*, 1 Cow. 550; *Coutant v. People*, 11 Wend. 511; *Clark v. People*, 26 Wend. 599; *Morris v. People*, 3 Den. 381; *N. Y., etc., R. Co. v. Van Horn*, 57 N. Y. 473; *Sweet v. City of Syracuse*, 129 N. Y. 316.)

Benjamin Steinhardt for respondent. The appeal herein should be dismissed. (*Matter of Attorney-General*, 155 N. Y. 441; Code Civ. Pro. §§ 190, 191, 1294, 1300, 1347, 1349, 1356, 1357, 3333 and 3334; *H. T. Co. v. W. T. & R. R. Co.*, 121 N. Y. 397; *Bate v. McDowell*, 97 N. Y. 646; *Allen v. Meyer*, 73 N. Y. 1; *Osterhoudt v. Osterhoudt*, 168 N. Y. 358; *People ex rel. v. Sternberger*, 153 N. Y. 684; *Matter of Welch*, 74 N. Y. 299; *Bryan v. Thompson*, 128 N. Y. 426.) Chapter 742 of the Laws of 1900 so far as it amends section 1759 of the Code of Civil Procedure in per-

mitting the court to annul, vary or modify a judgment previously rendered, is unconstitutional. (*Walker v. Walker*, 155 N. Y. 77; *Kamp v. Kamp*, 59 N. Y. 212; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Johns v. Johns*, 44 App. Div. 533; *Hauscheld v. Hauscheld*, 33 App. Div. 296; *Shepherd v. Shepherd*, 1 Hun, 240; *Noble v. Noble*, 20 App. Div. 395; *Park v. Park*, 18 Hun, 466; *Miller v. Miller*, 7 Hun, 208; *Lansing v. Lansing*, 4 Lans. 377; *Bucki v. Bucki*, 26 Misc. Rep. 67.)

GRAY, J. This was an application by the defendant for an order modifying and varying the direction as to alimony, contained in a judgment which had dissolved the marriage of the parties. The application was granted and an order was made changing the provisions of the judgment of divorce, by reducing the amount of alimony ordered to be paid by the defendant to the plaintiff from four thousand dollars to three thousand dollars a year. This order was reversed by the Appellate Division and the motion for the modification of the judgment was denied; whereupon the defendant appealed to this court.

Within the authority of *Wetmore v. Wetmore*, (162 N. Y. 503), the order is appealable and this court has jurisdiction to review the determination of the Appellate Division. The appeal presents a question of law as to the validity of chapter 742 of the Laws of 1900; in so far as it has amended section 1759 of the Code of Civil Procedure by permitting the court, upon the application of either party to an action, in which a final judgment has been granted dissolving the marriage of the parties and requiring "the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, * * * at any time after final judgment, *whether heretofore or hereafter rendered*," to annul, vary or modify such a direction. The amendment was in making the statute apply to judgments theretofore rendered. It was decided below that such legislation violated the constitutional provision, that no person shall

be deprived of property without due process of law, (Const. art. 1, § 6), in the attempt to confer a power upon the court to annul, or vary, valid and final judgments theretofore rendered.

The judgment divorcing these parties was rendered in 1892; it decreed the custody of their children to the wife, who was plaintiff in the action, and it ordered the defendant to pay to her, during her lifetime, the sum of four thousand dollars a year, in equal monthly payments in advance, for her support and that of the children. No appeal from the decree was prosecuted by the defendant, and it contained no provision reserving to the court the right thereafter to alter it; nor did the statute, then in force, confer any such power, although it existed where the action was for a separation. (Code Civ. Pro. § 1771.)

What jurisdiction the courts of this state acquired to entertain actions of divorce was conferred, wholly, by statute and their powers are confined to such as are expressed, or as may be incidental to the exercise of the jurisdiction conferred. (*Walker v. Walker*, 155 N. Y. 77.) Concededly, prior to this amendment, the jurisdiction of the court terminated with the final judgment in divorce actions, and there was neither inherent power in, nor authority conferred by the Code upon, the court to modify the judgment. (*Kamp v. Kamp*, 59 N. Y. 220; *Erkenbrach v. Erkenbrach*, 96 ib. 456.) In *Walker v. Walker*, the order increased the amount of alimony awarded by a final judgment of divorce, which was lacking in any provision reserving the power to change it, and the discussion in this court related to the effect of the section of the Code, at that time, (1897), in permitting the court, after a final judgment, to annul, vary, or modify it, in its direction for the payment of alimony. The argument was that the statute was remedial and, therefore, should be given a liberal and retroactive effect, and, while the denial of the contention was placed upon the ground that nothing indicated a legislative intent to affect judgments already entered, Judge MARTIN, in his opinion, added the significant remark that "if the doctrine

contended for was sustained, it would apply to the reduction of alimony in judgments existing when the amendments were adopted, as well as to its increase. If such an effect was given to them, their constitutionality might well be doubted, as they might affect the vested rights of a party."

The argument now made is that the provision for alimony "does not constitute a vested right belonging to the wife;" because, as I understand the contention, alimony, being incidental to the granting of a divorce, is within the discretionary power of the court to vary, according to the altered circumstances of the parties, and is but the wife's "mere potential expectant right" to the particular payments as they become due. It seems to me that, in such an argument, sight is utterly lost of the nature of a decree awarding alimony, or of the right, which accrues to the wife, as the result of an adjudication by the court; when, in divorcing the parties from their respective marital obligations, it fixes the alimony to be paid by the husband. The marriage relation has been terminated by the decree. The wife has no future rights, and the husband is under no future obligations, such as are founded upon, or spring out of, the marriage relation. Judge FINCH observed in *Matter of Ensign*, (103 N. Y. 284), that, "the court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife, which the decree cuts off and forbids in the future." By the decree, in this action, the obligation, before resting upon the husband for the support and education of the children and for the support of his wife, was changed. It, thereafter, was made to rest upon the wife and the decree adjudged that the husband should pay to her a certain fixed sum of money in a certain manner, in lieu of his previous obligation. The judgment defined and created a new obligation on his part and as the amendment of the statute, necessarily, affected the wife's right to compel exact performance and bore upon the obligation, to her possible injury, it was obnoxious to the constitutional prohibition. It would be absurd to call it remedial, as affecting merely a

remedy upon the decree. Even then, it would violate a substantial right of the plaintiff. It was, however, in fact, the impairment of, or interference with, a vested right conferred by a final judgment. The plaintiff's protection in the enjoyment of her right under the decree is not, necessarily, referable to the prohibition in the Federal Constitution against the impairment of the obligations of contracts. It is not at all necessary, for the plaintiff's purposes, that the judgment of divorce should be deemed a contract. A judgment is not a contract, in the ordinary sense of an agreement reached between persons, to whose terms their mutual assent has been given, and it is in that sense that the word is used in the Federal Constitution. (*State of Louisiana v. Mayor of New Orleans*, 109 U. S. 285.) A judgment creates an obligation of the highest nature known to the law and it is enforceable against the judgment debtor as upon his promise to perform it; but that promise is only implied by law. The obligation is imposed; it is not assumed voluntarily. But a final judgment creates and vests substantial rights, and, if the statute were allowed this retroactive effect, a new stipulation would be imported into it, in effect, that the defendant's obligation might be changed upon showing subsequently occurring facts.

In *State of Louisiana v. Mayor of New Orleans*, (*supra*), where it was held that a judgment of damages recovered for a tort was not a contract in the constitutional sense, Mr. Justice BRADLEY, in his opinion, takes occasion to say of it, that "it is founded upon an absolute right and is as much an article of property, as anything else that a party owns, and the legislature can no more violate it, without due process of law, than it can other property." In *Gilman v. Tucker*, (128 N. Y. 190), Chief Judge RUGER, delivering the opinion of this court, said: "We must bear in mind that a judgment has here been rendered and the rights flowing from it have passed beyond the legislative power, either directly, or indirectly, to reach or destroy. After adjudication, the fruits of the judgment become rights of property. These rights became vested by the action of the court and were thereby placed beyond the

reach of legislative power to affect." So fixed and so inviolate are the rights secured by a judgment that any legislation, which attempts to deprive a party of their absolute enjoyment, must be condemned. It has been quite recently held, in accordance with a line of authorities, that legislation conferring a right to appeal from a judgment, which, according to existing law, had become final, was violative of section VI of article I of the State Constitution, as depriving a party of his property in a vested right conferred by the judgment. (*Germania Sav. Bank v. Village of Suspension Bridge*, 159 N. Y. 362; and see *Burch v. Newbury*, 10 ib. 374.) It is the peculiar privilege enjoyed by the citizens of this country that the legislative body is not above the law and that its powers are prescribed and limited by a written Constitution. Their lawful contracts are beyond legislative interference and they may not be deprived of their vested rights without due process of law. They are secure against an arbitrary exercise of governmental power, which is unrestrained by the established principles of private rights. The judgment in this case, in determining that, for cause, the marriage should be dissolved, also, determined, with equal finality, that the defendant, while released from the general duty, or liability, which he had been under, should pay a fixed sum during the plaintiff's life. Can it, reasonably, be doubted that a right was vested in the plaintiff to the receipt of the annual sums, which the judgment adjudged the defendant should pay? As Judge CULLEN well expressed it, in his dissenting opinion at the Appellate Division, in *Walker v. Walker*, (21 App. Div. 226), "the plaintiff, prior to the decree, had a right of support; by her divorce, she lost that right and, in substitution for it, acquired a new right, a judgment requiring the payment to her of a specific sum of money." That right, as a vested interest, is property, which the legislature is powerless to divest her of. If the interest is, as it is claimed, an expectant one, in the sense that the obligation of the defendant was a continuing one to pay alimony in the future, nevertheless, the interest was one fixed by the judgment and was not a mere contin-

gency. It was not a capacity to acquire a right to the payment of money; it was a right fixed by the judgment and, hence, vested in the plaintiff. I think enough has been said, in connection with the careful and elaborate opinion of Mr. Justice INGRAHAM, at the Appellate Division, to warrant me in advising the affirmance of the order appealed from, with costs.

O'BRIEN, J. (dissenting). The plaintiff, in the month of April, 1892, obtained a judgment against the defendant dissolving their marriage and decreeing alimony to the plaintiff in the sum of four thousand dollars per year. In April, 1901, the defendant applied to the court to reduce the alimony upon proofs which disclosed the fact that his pecuniary circumstances and conditions had so changed since the judgment was entered that he was unable to pay that sum annually. The motion was opposed by the plaintiff and the issues referred to a referee to inquire and report upon the defendant's circumstances and financial condition as they then existed. The referee took proofs and made full inquiry and reported that the defendant's income for that year was a trifle more than four thousand dollars per year, and that there was no prospect or probability that it would be any more in the future. He also reported that at the time the judgment was entered the defendant's annual net income was twelve thousand dollars, and advised the court that the alimony should be reduced to three thousand dollars, and the court confirmed the report and so ordered. The learned court below upon appeal has reversed the order and denied the application, but not upon the facts, nor upon any question of discretion, but upon the law, holding that the court had no power to make the reduction, since the statute under which it acted was void as in conflict with the Constitution. That presents the only question in the case. The statute which is thus annulled, in so far as it applies to this case, is section seventeen hundred and fifty-nine of the Code as amended by chapter 742 of the Laws of 1900, and reads as follows: "The court may, in the

final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, whether heretofore or hereafter rendered, annul, vary or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained." The precise question is whether the legislature has the power to authorize the courts to review and readjust provisions in a judgment for divorce, entered prior to the amendment, concerning the amount of alimony when it appears that the circumstances and financial condition of the parties have changed so that the wants of the wife are less and the ability of the husband to pay has been reduced from twelve thousand dollars to a little over four thousand dollars. The plaintiff has remarried and has a husband able and willing to support her, and the defendant remarried in another state and now has his second wife and four children to support in the city of New York.

The general power of the legislature with respect to marriage, divorce and alimony is not and cannot be questioned. It may prescribe how the marriage contract may be made, how established and how and for what cause it may be abrogated or dissolved. We have before us the case of a woman who is entitled to be supported by two husbands and a man who is bound to support two wives, and it has been solemnly decided that there is no power in any department of the government under which the parties live, nor in all of its departments together, to change, mitigate or modify this situation in the slightest particular. This is a somewhat striking

statement, but it is nothing more than a plain, logical deduction from the record in this case. The mind does not readily accept the assertion without some inquiry with respect to the arguments and reasons upon which the proposition is founded. When it is said that there is one thing at least which the legislature, in the plentitude of its power over all subjects connected with marriage, divorce and alimony, cannot touch, namely, the amount of the alimony when once fixed in the decree, some conclusive reason should be given in support of the assertion, and vague generalizations will not throw much light on the question. If the plaintiff had not been allowed any alimony at all and the defendant was now worth a million or five millions, we are told that there is no power in the state to mitigate the situation, since it is so nominated in the judgment, and that is a thing that cannot be changed by any power on earth. The argument that leads to such astonishing results must be based upon or infected at some point with error. It is not, I think, very difficult to point it out. It consists entirely in the assumption that the legislature violated the Constitution in the enactment of the statute. After reading the briefs of counsel and the discussion in the learned court below, it is rather difficult to perceive the precise provision of the Constitution which is claimed to have been violated. No one has, so to speak, put his finger on the precise provision. But there are only two provisions that can possibly have any application to this case. The first is not a part of the State Constitution at all, but is a part of the Federal Constitution, and it forbids the enactment of any law impairing the obligation of contracts. The contention is that the section of the Code quoted above is such a law.

The mind is at once set upon the inquiry to find out what contract had been impaired in this case, who the parties are that made it, and how it is evidenced. Of course, there can be no contract without parties, and if any contract was made at all it must have been made between the plaintiff and the defendant, and the only evidence of it is the provision in the decree of divorce whereby it is said the defendant contracted

to pay to the plaintiff four thousand dollars annually during her life. That, of course, is nothing but a pure fiction. The parties certainly did enter into a contract of marriage with each other, and while that is admitted to be the most important and binding of all contracts, no one ever claimed that the legislature or the court violated any provision of the Constitution in dissolving it. The contention is that the court in dissolving the marriage with one breath, in the next created a new contract which is *indissoluble*, and that is the obligation of the defendant to pay to the plaintiff a reasonable sum out of his estate, and that sum was found to be at that time four thousand dollars a year. Alimony is the support which the court decrees in favor of the wife as a substitute for the common-law right of marital support. No one denies the power to deprive the wife of that common-law right for any fault on her part that the legislature may judge to be sufficient, but it seems that the substitute under the decree is more sacred and unchangeable than the original right which she acquired by the marriage, since the latter may be affected by legislation, while the former cannot be.

An unsound or fallacious argument is often exposed by following it up to all of its natural or logical sequences, but it is not necessary to pursue that form of reasoning any farther in this case, since it is as well settled by authority as any question can be, that the provision for alimony in the judgment in this case is not a contract within the meaning of the Constitution. It has been so decided by this court and by the Supreme Court of the United States, which is the court of last resort upon all questions of this character. In *O'Brien v. Young* (95 N. Y. 428) it was held that even an ordinary money judgment was not a contract. The question arose upon the act of the legislature in reducing interest from seven to six per cent. (Laws of 1879, ch. 538.) The act in terms excluded from its operation "any contract or obligation made before the passage of this act." The judgment was rendered before the law was passed, and the contention was that it came within the exception, but this court held, after very full discussion, that the

judgment was not a contract, and that the legislature had power to reduce the interest one per cent, and of course if it could so reduce the interest on a seven per cent judgment, it could reduce it to two per cent. It was subsequently decided that a judgment was not an express or implied contract within the meaning of section 638 of the Code, which authorized an attachment in actions upon such contracts. (*Remington Paper Co. v. O' Dougherty*, 32 Hun, 255 ; affirmed, 96 N. Y. 666.) But this view seems to have been subsequently modified, at least so far as to allow the provisional remedy in such an action. (*Gutta Percha & R. Mfg. Co. v. Mayor, etc., of Houston*, 108 N. Y. 276.) But the cases in the Federal court are so clear and conclusive that they leave no room for doubt or distinctions. In *Chase v. Curtis* (113 U. S. 464) that court stated the rule in the following terms: "And it was decided by this court in the case of *State of Louisiana v. Mayor of New Orleans* (109 U. S. 285) that a liability for a tort, created by statute, although reduced to a judgment by a recovery of the damages suffered, did not thereby become a contract, in the sense of the Constitution of the United States, forbidding state legislation impairing its obligation, for the reason that the term 'contract' is used in the Constitution in its ordinary sense as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence." In the case cited above by the learned court the following is the language of the opinion: "A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered ; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. But this fiction cannot convert a transaction wanting the assent of the parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

authority against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition."

A marriage contract may be dissolved by a direct or special act of the legislature, and such a law does not impair the obligation of a contract. Marriage is something more than a mere contract. It is a *status* or institution of society founded upon the consent of the parties and the subject of regulation by law. It is not embraced within the terms or meaning of the Constitution which forbids the states from enacting laws impairing the obligation of contracts. (*Maynard v. Hill*, 125 U. S. 190; *Hunt v. Hunt*, 131 U. S. Appendix, 165.) The contention that the provision for alimony in this judgment is a contract may, therefore, be dismissed from further consideration

The only other conceivable ground that the statute in question can be assailed as violative of the Constitution must be that it deprives the plaintiff of her property without due process of law. That contention implies that this incidental provision in a judgment of divorce which the law and the courts might grant or deny at pleasure is property. It cannot be sold or transferred or bequeathed by will or pass to next of kin in case of intestacy. It has no more of the attributes of property than the common-law right to marital support, for which it is an imperfect substitute. It must be apparent that from the general nature and character of alimony and its limitations that it is taken out of the general law of property. It is a creation of equity, and a statute that empowers courts of equity to administer it or reduce or modify it as to amount or otherwise as changed conditions and circumstances may require in order to do equity between the parties, violates none of the guaranties of the Constitution for the protection of property. Will it be contended for a moment that a

woman who has procured a divorce with a large allowance of alimony and who thereafter conducts herself morally so as to become a public scandal, has secured such a property right in the allowance that no power on earth can modify it simply because the decree was entered prior to the enactment of the statute in question? Has she acquired such an absolute right to the allowance that the husband must keep on paying it, although he has lost all his property and the judgment virtually sends him to the poorhouse? To argue that there is no human power capable of mitigating or modifying such a situation is to my mind a most astonishing proposition, and yet it is the logical result of the plaintiff's contention in this case. It is true that no one charges the plaintiff with even the slightest impropriety, but it is quite conceivable that such a case may arise, and it is mentioned here only to test an argument that seems to me to be infected with a fundamental error. The truth is that neither a marriage nor a judgment of divorce or any of its incidents is property within the meaning of the Constitution. (Bishop on M. & D. §§ 1430, 1434.) Nothing would seem to be more reasonable than the proposition that the state, which once exercised the power to grant divorces, with or without alimony, by special acts, a power which it could again resume, has still power enough left to enact the section of the Code referred to as it now stands. It may take the property of the citizen by the taxing power to any extent. It may surround him with police regulations by day and by night that restrict his liberty and affect his property, but it seems, from the argument of the learned counsel for the plaintiff, that there is one thing that the state cannot touch, even to promote justice, and that is a woman's alimony when the judgment is more than three years old. It has been often held that the courts have inherent power to open judgments and grant new trials for newly-discovered evidence, and this is done long after the judgment has been entered and even after it had been affirmed in this court and become final. The limit of time within which this may be done is a matter that rests in the discretion of the

court. It has never been held or seriously suggested that the exercise of this power invaded any constitutional immunity or disturbed any vested right, and yet it is a much broader power than that expressly conferred upon the court by the statute in question since the latter permits the court only to modify the judgment with respect to the alimony and then only upon new facts and conditions arising subsequent to the entry of the judgment. It is, I think, quite safe to say that it has never been held that a provision in a judgment of divorce granting alimony was either a contract or property within the meaning of the Constitution.

It may be that detached *dicta* and remarks in text books and cases and hasty and superficial views may be picked out here and there that would seem to give some color to the contention, but they will not bear much examination. A good many crude things may be found in the books on the subject of alimony, its nature and limitations. A learned author, who has written exhaustively on the subject, overwhelmed and confused with the numerous and conflicting views, was constrained to make some remarks which, although they may savor somewhat of egotism, may very well be adopted and acted upon both by the bar and the bench: "In spite of the fact that the law consists of reason, and that reason is constantly detecting and pointing out judicial blunders, by means whereof cases wrongly decided and false doctrines are overruled, it is no novel thing for a bench of judges to accept some thoughtless utterance of a predecessor as though it were reason, without a particle of examination to see whether it is just or false. Indeed, through this sort of abnegation of the office of thinking our law has been made to linger, and it now remains in the shadows of the dark ages, instead of walking onward with the other sciences toward the light of a better future." (1 Bishop on M. & D. § 1393.) We are now dealing only with the question whether there is power enough in this sovereign state to readjust alimony and modify the allowance as to past judgments where it appears to be grossly inequitable by reason of the changed condition of the parties.

We have just held, what has often been held before, that this court never will pronounce an act of the legislature void until it is compelled to. This was in a case where there was little else but constitutional questions involved or argued. (*People ex rel. Devery v. Coler*, 173 N. Y. 103.) But if we were to content ourselves with a mere superficial glance at the numerous cases cited in the progress of the discussion below and here, one would be led to suppose that this court, at various times within the last thirty years, has been deciding a constitutional question that could not possibly arise until less than three years ago. These cases are all sound law, but they have no bearing on the question whether the legislature violated the Constitution in amending the Code. A brief review of these cases most prominently put forth will show that they have nothing to do with the question now before us.

The case of *Kamp v. Kamp* (59 N. Y. 212) was decided nearly thirty years ago. All that it decided was that the jurisdiction of the court in divorce cases terminated with the final judgment. It was also held that there was then no inherent or statutory power to modify the judgment upon proof of circumstances arising after its entry and where the financial condition of the parties had changed. That case decides what the law was prior to any legislation on the subject.

The case of *Erkenbrach v. Erkenbrach* (96 N. Y. 456) was decided over eighteen years ago and it simply held that the courts of this state have no common-law jurisdiction over the subject of divorce and had no powers in that respect except such as were expressly conferred by statute or were incidental to powers conferred. It was also held that the court had no power after the entry of a judgment for divorce to order an additional allowance for the support of the wife, but could make an additional allowance for the care, custody and education of the children.

The case of *Romaine v. Chauncey* (129 N. Y. 566) was decided over ten years ago. It was held in that case that alimony, by reason of its nature and express limitations, was taken out of the general law of property, and as it was created

by equity it should have the protection of equity, so that it may not be perverted to a purpose for which it was not intended; that alimony is something incidental to a decree of divorce in favor of the wife and is simply the allowance for her support and not a debt due to her from her husband, but a substitute for the marital obligation of support from which the husband, because of his misconduct, is not relieved by the decree. The marital obligation is, by the judgment, made specific and measured by the court. And hence that a general duty of marital support over which the husband had a discretionary control had been changed into a specific duty. It is difficult to see how the doctrine of that case helps the plaintiff's contention.

The case of *Walker v. Walker* (155 N. Y. 77) was decided two years before the Code, as it now exists, had been amended. There was no question involved or decided in the case except the construction of the Code under the amendment of 1894, to the effect that the court might, after final judgment, vary the direction as to alimony. As there were then no retroactive words in the statute it was decided that it applied only to judgments rendered after its passage and not to those entered before. All that the appeal in that case involved or the court decided was the construction of the statute then existing, and the general rule was followed that it would be deemed to operate upon future judgments only and was not retroactive in the absence of express words to that effect. It is very plain that none of these cases involved any question with respect to the power of the legislature to enact the section of the Code on this subject as it now stands. They decided what the law then was, but did not attempt to decide anything in regard to the power of the legislature to change the law from time to time and make it what it now is. The Code now has supplied what was found to be wanting in these cases. It has conferred power to modify an allowance of alimony in *all* cases, and it has not yet been decided that such an act violated the Constitution.

The legislature cannot exercise any judicial power. It can-

not decide controversies, vacate or annul judgments or grant new trials. While there is no express provision of the Constitution to that effect, it is plainly implied and forbidden from the division of the different powers of government between the three departments and neither can usurp the functions of the other. (*In re Greene*, 166 N. Y. 485.) The cases on that subject have no application here, for the plain reason that by the statute in question the legislature did not attempt to exercise any judicial power whatever. It simply conferred upon the courts judicial powers that they did not possess before. That it had the right to do and it is done at nearly every session by Code amendments or otherwise. The power of the courts over judgments for alimony in divorce cases may be enlarged and made retroactive even to the extent of abolishing an existing right of appeal. (*Matter of Palmer*, 40 N. Y. 561.)

It will be seen that the discussion has been closely confined to the only question that is presented by this appeal. The parties or their conduct are of very little consequence so far as the real question is concerned. This remark is suggested by the fact that some things have been made quite prominent in the discussion of the question that are foreign to it and can serve no purpose but to prejudice and mislead the mind. For instance, it is said that the defendant contracted a second marriage in defiance of the judgment of the court. If he has done anything wrong in that respect he ought to be punished for it, but his conduct does not affect the power of the legislature to pass the law in question. Both parties have contracted a second marriage, the plaintiff in this state and the defendant in another state. If the defendant's second marriage was valid at the place where it was contracted it is generally valid everywhere. Neither the judgment nor the statute of this state has any extraterritorial operation, and so far as we can know from the record, the marriage of the one party is as good in the eye of the law as that of the other. I assume that such marriages are quite common among divorced people, and there is nothing before us to

N. Y. Rep.]

Statement of case.

show that either one was illegal. If, however, there was anything in the defendant's moral conduct that ought to deprive him of the benefit of the amendment, the learned court below had the power in the exercise of its discretion to reverse upon the facts, but since it did not, we have no right to consider anything but the question of law. (*Wetmore v. Wetmore*, 162 N. Y. 503.) I think the section of the Code is not open to any constitutional objection, and that the order of the Appellate Division should be reversed and that of the Special Term affirmed.

PARKER, Ch. J., MARTIN and CULLEN, JJ., concur with GRAY, J.; HAIGHT and VANN, JJ., concur with O'BRIEN, J. Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM J. GLEN, Appellant.

1. CRIMES — GROUNDS OF MOTION FOR DISMISSAL OF INDICTMENT SPECIFIED IN CODE CR. PRO. § 313, NOT EXCLUSIVE. Section 313 of the Code of Criminal Procedure, relating to the grounds upon which an indictment must be set aside on motion, so far as it is intended to regulate only matters of procedure which involve no constitutional rights, is valid and must be obeyed by the courts; but to the extent that it may destroy, curtail, affect or ignore the constitutional rights of a defendant it has no force and is void. A motion to dismiss an indictment against him may be entertained on other grounds, therefore, than those specified in the section.

2. APPEAL — CHARGE TO GRAND JURY NOT PROPERLY AUTHENTICATED CANNOT BE CONSIDERED. Where it appears from the record on appeal that the only authentication of a charge to the grand jury is the affidavit of a newspaper reporter that he made and published a copy of a paper given him by the court stenographer purporting to be a transcript of the charge, an alleged error therein will not be considered by the Court of Appeals.

3. INDICTMENT PRESUMED TO HAVE BEEN BASED UPON LEGAL AND SUFFICIENT EVIDENCE. *It seems*, that a charge to the grand jury that "If what is charged in these affidavits shall be proven before your body, then it will be your duty to find a bill of indictment for this misdemeanor against the persons who are guilty of it," assuming it to be erroneous, does not bind the grand jury, and it cannot be presumed that it was

influenced thereby, unless it deliberately ignored its duty under the statute to find an indictment only upon legal evidence, which unexplained or contradicted would warrant a conviction. (Code Cr. Pro. §§ 256, 258.) Such charge, however, is strictly correct, since "proven before your body" means proven by legal evidence and by the amount or weight of evidence that would support an indictment in any case.

4. READING OF AFFIDAVITS TO GRAND JURY—FAILURE TO INDORSE NAMES OF WITNESSES UPON INDICTMENT. The fact that affidavits were read to the grand jury by the judge alleged to have charged it, which tended to show the commission of the crime for which the defendant was subsequently indicted, is not sufficient to overcome the presumption that the indictment was based upon legal and sufficient evidence, nor is the fact that the record contains no indorsement of the names of witnesses upon the indictment, as required by section 271 of the Code of Criminal Procedure; the grand jury is presumed to have done its duty and to have found the indictment wholly upon sufficient and legal evidence received within the grand jury room.

People v. Glen, 64 App. Div. 167, affirmed.

(Argued January 12, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 21, 1901, affirming a judgment of the Wayne County Court rendered upon a verdict convicting the defendant of the crime of embracery.

The facts, so far as material, are stated in the opinion.

George Raines and *Willard A. Glen* for appellant. The court erred in denying the motion to set aside the indictment made before plea of defendant on the grounds that improper papers and hearsay evidence were presented to the grand jury for their consideration, by the judge, and that the judge charged the grand jury erroneously with reference thereto. (*People v. McKenna*, 81 N. Y. 360; *People v. Flack*, 125 N. Y. 335; *People v. Vaughn*, 19 Misc. Rep. 298; *People v. Helmer*, 154 N. Y. 596; *Chapman v. E. R. R. Co.*, 55 N. Y. 587; *Allis v. Leonard*, 58 N. Y. 288; *People v. Quin*, 1 Park. Cr. Rep. 340; 59 Hun, 400; 3 N. Y. Cr. Rep. 42; *People v. Pformer*, 4 Park. Cr. Rep. 538; *People v. Breen*, 4 Park. Cr. Rep. 380; *Read v. Hurd*, 7 Wend. 408.)

N. Y. Rep.] Opinion of the Court, per WERNER, J.

Charles T. Ennis for respondent. The trial court properly refused to set aside the indictment. (*People v. Dunn*, 157 N. Y. 528; *People v. Petrea*, 92 N. Y. 128; *People v. Rutherford*, 47 App. Div. 209; *People v. Montgomery*, 36 Misc. Rep. 326; *People v. O'Connor*, 31 Misc. Rep. 668; *People v. Willis*, 28 Misc. Rep. 568.) The instructions to the grand jury furnish no grounds for reversal. (Code Crim. Pro. § 248.)

WERNER, J. On the 5th day of February, 1898, the defendant was indicted by a grand jury of Wayne county for the crime of embracery under section 75 of the Penal Code which, so far as it is applicable to the case at bar, provides that "a person who influences or attempts to influence improperly, a juror, in a civil or criminal action or proceeding, or one drawn or summoned to attend as such a juror * * * in respect to his verdict, judgment * * * or decision, in any cause or matter pending, or about to be brought before him, in any case, * * * is guilty of a misdemeanor." The indictment charges, in substance, that on or about the 5th day of February, 1898, the defendant did attempt to improperly influence, in respect to his decision and judgment in a certain cause and matter pending and about to be brought before him, one Abram Weed as a member of the grand jury theretofore summoned and about to be convened at the court house in and for the county of Wayne on the 7th day of February, 1898. The indictment then proceeds with a detailed statement of the particulars of the offense, and concludes with the charge that the defendant then and there well knew that said Abram Weed had been theretofore drawn and summoned as such grand juror, and that the cause and matter respecting which the alleged improper influence was exerted was then pending and about to be brought before the said Abram Weed and his associates as a grand jury.

After the indictment was found it was sent to the Wayne County Court for trial. The case was tried and submitted to the jury under a charge to which no exception was taken

that is now presented for review. The alleged error of the trial court in its charge upon the subject of proof of defendant's good character was discussed by appellant's counsel in this court, but, as no exception to this portion of the charge was taken at the trial, it cannot be considered here.

On the 28th day of March, 1898, the defendant was convicted of the crime for which he was indicted. Thereupon he appealed to the Appellate Division, which sustained the judgment of conviction, by a divided court. Among other questions considered by that court was the one whether the evidence was sufficient to sustain the conviction. A majority of the court held that it was. As we have no jurisdiction to pass upon the weight of evidence, the decision of the Appellate Division upon that branch of the case is final. We cannot say there is no evidence to sustain the judgment. There are other questions, however, which we are called upon to review. After the defendant had been arraigned in the County Court, he demurred to the indictment. This demurrer was based upon grounds that are not material here. The demurrer was overruled, and thereupon the defendant moved to dismiss the indictment. The order denying the motion to dismiss the indictment recites that it was made under sections 313 and 671 of the Code of Criminal Procedure, but the affidavits upon which the motion was based clearly show that the real ground of the motion was that the learned justice of the Supreme Court, presiding at the term for which the grand jury above referred to had been impaneled, had committed error in reading to them certain affidavits bearing upon the accusation brought against this defendant and in the instructions given to the grand jury upon that subject. This is not one of the grounds specified in section 313. Two questions are presented for our consideration upon this appeal. *First.* Can a motion by a defendant to dismiss an indictment against him be entertained on any other grounds than those specified in section 313, Code of Criminal Procedure? *Second.* If such a motion can be heard on other grounds was error committed by the learned justice of the Supreme Court in read-

N. Y. Rep.] Opinion of the Court, per WERNER, J.

ing affidavits to the grand jury and in his instructions to them relating to the accusation against the defendant of the crime of which he was subsequently convicted?

Section 313 of the Code of Criminal Procedure provides that "The indictment must be set aside by the court in which the defendant is arraigned, and upon his motion, in either of the following cases, *but in no other*: 1. When it is not found, indorsed and presented as prescribed in sections 268 and 272. 2. When a person has been permitted to be present during the session of the grand jury while the charge embraced in the indictment was under consideration, except as provided in sections 262, 263 and 264." Section 671 refers only to dismissals of indictments on motion of the court, or of the district attorney, and need not be discussed.

The words "but in no other" were added to the first paragraph of section 313 in 1897, and were evidently intended to remove all doubts which had been raised as to the meaning of said section by the conflicting decisions of the courts upon that subject. In many cases it had been held that this Code provision, as it stood prior to 1897, could not limit or interfere with the inherent power of the courts to dismiss indictments upon other substantial grounds than those enumerated in the section referred to. (*People v. Molineux*, 27 Misc. Rep. 79; *People v. Vaughan*, 19 id. 298; *People v. Thomas*, 32 id. 170; *People v. Clark*, 8 N. Y. Crim. R. 169; *People v. Brickner*, Id. 217; *People v. Moore*, 65 How. Pr. 177.) In other cases it had been held that this section of the Code was exclusive, and distinctly negated the rights of courts to dismiss indictments upon any other grounds than those therein enumerated. (*People v. Rutherford*, 47 App. Div. 209; *People v. Willis*, 23 Misc. Rep. 568; *People v. Winant*, 24 id. 361; *People v. O'Connor*, 31 id. 668; *People v. Montgomery*, 36 id. 328; *People v. Scannell*, 37 id. 345.)

That the legislature has the undoubted right to regulate mere matters of procedure in all actions and proceedings, both criminal and civil, is too well established to require either discussion or citation of authority. But it is equally clear

that no legislative enactment can be permitted to deprive the citizen of any of his constitutional rights. From time immemorial our common-law courts have exercised the power to set aside and quash indictments on motion, not only for defects in form, but for irregularities and errors that were proved by extrinsic evidence. Such matters are now regulated by the provisions of the Code of Criminal Procedure, and however inconvenient, or even oppressive, they may appear to be in specific cases, the courts must apply them, as best they can, for they embody the commands of the law-making power in matters wherein its fiat is supreme and final.

But our courts have also always asserted and exercised the power to set aside indictments whenever it has been made to appear that they have been found without evidence, or upon illegal and incompetent testimony. (*U. S. v. Coolidge*, 2 Gall. 364; *People v. Restenblatt*, 1 Abb. Pr. 268; *People v. Briggs*, 60 How. Pr. 17.) This power is based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent oppression or persecution. It is a power which the legislature can neither curtail nor abolish, and, to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional.

The broad application of these principles to the case at bar is simple. So far as said section 313 is intended to regulate only matters of procedure which involve no constitutional rights, it is valid and must be obeyed by the courts; but to the extent that it may destroy, curtail, affect or ignore the constitutional rights of a defendant, it has no force and is void. (*People v. Petrea*, 92 N. Y. 143.) The next inquiry in logical progression is whether said section 313, as applied to this case, does invade this defendant's constitutional rights. For the purposes of this discussion we shall assume, although we do not decide, that the defendant had the same right to have this charge of misdemeanor against him prosecuted by indictment that he would have had if charged with the commission of a felony.

The grand jury is an institution that we inherited with the

N. Y. Rep.] Opinion of the Court, per WERNER, J.

common law. It is for many legal purposes rather difficult of classification. It is neither a regularly organized tribunal, nor yet an entirely informal body. While in a certain sense a part of the court in connection with which it conducts its deliberations, it is, for many purposes, free from any restraint by that court. A grand jury is clothed with power to determine both the facts and the law, and its methods of procedure, so far as they are not discretionary, are fixed by statute and not by rules of courts. The judge or justice presiding at a court held in connection with a grand jury, must charge them, but beyond the explicit direction to read or deliver to them sections 252 to 267, inclusive, of the Code of Criminal Procedure, the character and scope of the charge is largely a matter of discretion. No exception lies to such a charge, and there is no method by which the proceedings of a grand jury can be reviewed, except by motion to dismiss an indictment, or in arrest of judgment. (*People v. Dinick*, 107 N. Y. 15.) The learned justice presiding at the term of court during which the defendant was indicted as above set forth, having heard rumors of attempts to improperly influence grand jurors in a certain case which was to be brought before them, summoned the grand jury into court and delivered a charge of which there is a purported transcript or copy in the record. The portion selected by the defendant for criticism is that in which the justice said, "If what is charged in these affidavits shall be proven before your body, then it will be your duty to find a bill of indictment for this misdemeanor against the persons who are guilty of it." It is urged on behalf of the defendant that in the use of this language the court committed error which affected the substantial rights of the defendant and entitled him to a dismissal of the indictment thereafter found against him. There are several answers to this suggestion. 1. Assuming that the charge in this particular was erroneous, the grand jury were not bound by it, and we cannot assume that they were influenced thereby, unless we take it for granted that they deliberately ignored the statutory command to receive none but legal evidence (sec. 256,

Code Crim. Pro.), and to find an indictment only where the evidence before them "is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." (Sec. 258; Code Crim. Pro.) 2. The statement of the learned justice was strictly correct. Note his language. "If what is charged in these affidavits is proven before your body, then it will be your duty to find a bill of indictment," etc. It must be presumed that when the grand jury was impaneled, the justice either read to them the sections of the Code of Criminal Procedure above referred to, or gave them copies thereof. These sections contain specific directions as to the kind and degree of evidence required before an indictment can properly be found in any case. In his charge the justice made no reference to the kind or degree of proof required to warrant the finding of an indictment under section 75 of the Penal Code and it is, therefore, fair to presume that the grand jury understood the phrase "proven before your body" to mean proven by legal evidence, and by the amount or weight of evidence that would support an indictment in any case. 3. It is to be observed that, in a record which is obviously defective in many respects, the only authentication of the charge to the grand jury, which is here the subject of discussion, is the affidavit of a newspaper reporter that he made and published a copy of a paper given him by the court stenographer, purporting to be a transcript of the charge. The record on appeal is certified to by the county judge before whom the case was tried. The charge in question was delivered by a justice of the Supreme Court, who has certified to nothing. In its last analysis, therefore, the question is, whether the presumptive regularity of an indictment shall be overthrown by a newspaper report of a charge to a grand jury. The statement of the proposition carries its own answer.

But it is urged that certain affidavits were read by the justice to the grand jury, and that this was an invasion of defendant's rights, because it was in violation of section 256 of the Code of Criminal Procedure, which provides that "The

N. Y. Rep.] Opinion of the Court, per WERNER, J.

grand jury can receive none but legal evidence." Here, again, there is an obvious weakness in defendant's contention. An indictment is a record of the court which imports absolute verity until properly impeached. (*People v. Hulbut*, 4 Denio, 133, 136.) The presumption is that an indictment is based upon legal and sufficient evidence until there is satisfactory proof to the contrary. In the case at bar there is no proof of that kind, unless it is to be found in the reading of the affidavits above referred to. Did the grand jury thus receive illegal evidence? We think not. An affidavit read outside of the grand jury room is not evidence received by a grand jury. It is certainly not evidence when a grand jury is plainly instructed that the allegations of an affidavit must be proven before that body in order to warrant the finding of an indictment. To hold otherwise would be to discourage what may be a very useful and conservative practice in such cases as the one at bar. The learned presiding justice was informed that attempts had been made to improperly influence grand jurors. It was his obvious duty to take some steps in the matter. Did he exceed the limits of his duty and power because he thought it wiser to have sworn statements upon which to base his inquiry than to rely upon unverified rumors? Were the grand jury influenced to any greater extent by the reading of affidavits made by some of its members than they would have been by the oral statements of the justice? Can the reading of affidavits in a court room be sufficient to overthrow the presumption that an indictment was founded wholly upon sufficient and legal evidence received within a grand jury room?

All of these questions, it seems to me, must be answered in the negative, unless we are ready to say that, when an indictment is assailed without proof, it must be upheld by affirmative evidence. In *Hope v. People*, (83 N. Y. 423) the question arose whether it was error to submit to the grand jury certain affidavits presented before the committing magistrate, and this court there held that it could not be presumed that the grand jury made any improper use of them or did

not proceed according to law. But it is said that the record contains no indorsement of the names of witnesses upon the indictment as required by section 271 of the Code of Criminal Procedure, and that this lends weight to the otherwise unproven assertion, that the indictment herein was based entirely upon the affidavits read in the court room. Upon this feature of the case it is enough to say that the indorsement is not essential to the validity of the indictment, and the failure to make the indorsement cannot raise a presumption that no witnesses were sworn or examined, since the same section of the Code expressly provides for the making of such indorsement, upon the application of a defendant, whenever it has been omitted.

We think it was not error to deny the motion to dismiss the indictment, and as we cannot, in this court, consider the sufficiency of the evidence, the judgment of the Appellate Division must be affirmed.

PARKER, CH. J., GRAY, HAIGHT and MARTIN, JJ., concur; BARTLETT, and VANN, JJ., not voting.

Judgment affirmed.

CHARLES MATTESON et al., Appellants, v. ALBERT R. PALSER et al., Respondents.

1. ACTION TO CHARGE HEIRS AT LAW AND DEVISEES WITH DEBTS OF THEIR DECEDENTS—GRANTEES UNDER TRUST DEED NOT LIABLE AS HEIRS AT LAW. Where, in an action brought by a creditor under sections 1843-1860 of the Code of Civil Procedure against the heirs at law of two deceased sisters to recover a deficiency arising upon the foreclosure, after their death, of a mortgage made by them in their lifetime to secure the payment of their note to plaintiffs' assignor, the children of one of the co-debtors did not derive title to their mother's real property by descent or devise, but as grantees under a conveyance of all her property made in her lifetime to a trustee, whereby she reserved to herself the income thereof during her life, and on her death gave the remainder to her children, they are not liable for their mother's debt as the heirs at law of her real property, in the absence of proof that the conveyance was made with intent to defraud her creditors, and that at the time of the execution thereof the mortgaged property was not sufficient to pay plaintiffs'

N. Y. Rep.]

Statement of case.

note, which proof can only be adduced in an action brought by one creditor in behalf of himself and all other creditors, under section 232 of the Real Property Law (L. 1896, ch. 547), to set aside the conveyance as fraudulent.

2. SAME — CONSTRUCTION OF WILL — WHEN IT DOES NOT SUSPEND POWER OF ALIENATION FOR MORE THAN TWO LIVES IN BEING. Where, in such action, some of the defendants are liable as heirs at law of a deceased aunt only in the event that her will devising her real property to others should be held invalid because it provided that all of her property should be divided equally among the children of a deceased sister, and that her executors should take care of and manage her estate and pay the income thereof to such nephews and nieces until the youngest survivor of them should arrive at the age of thirty years, when such executors, or the survivor of them, should divide and pay over the residue of the estate to such nephews and nieces, to the survivors or survivor of them, such will is not invalid, because the ownership of the personal property and the power of alienation of the real property might be suspended for five lives, in the absence of proof that any of such beneficiaries were under the age of thirty years at the time of the death of testatrix, and, therefore, the testatrix cannot be held to have died intestate, and no recovery can be had against any of the defendants as the heirs at law of her real property.

3. SAME — FAILURE TO RECOVER AGAINST DEFENDANT AS HEIR AT LAW DOES NOT PRECLUDE RECOVERY AGAINST HIM AS DEVISEE. Notwithstanding the fact that plaintiff in such action sought to have the will of one of the co-debtors held invalid and to hold all of the defendants liable as her heirs at law as if she had died intestate, such claim is not inconsistent with and does not prevent a recovery against one of such defendants as a devisee under the will for such a proportion of the debt as he would have been liable to pay as an heir at law, although as a devisee he would have been liable for a larger amount, and so long as plaintiff is satisfied with such recovery it should not be disturbed when the only change on a new trial would be to increase its amount.

4. APPEAL — STATUTE OF LIMITATIONS — QUESTION OF FACT. When the trial court made no finding on the question whether the Statute of Limitations barred plaintiff's claim in such action, and the reversal by the Appellate Division is not stated to be on the facts, the question is not reviewable in the Court of Appeals.

Matteson v. Palsen, 56 App. Div. 91, modified.

(Argued December 12, 1902; decided February 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 14, 1900, reversing a judgment in favor of plain-

tiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Duane P. Cobb for appellants. Mary King took a vested remainder under the will of Jerome B. King, deceased. (*Matter of Bennett*, 3 K. & J. 280; *Matter of Theed*, 3 K. & J. 379; *Halifax v. Wilson*, 16 Ves. 171; *Leaning v. Sherratt*, 2 Hare, 14; *Loder v. Hatfield*, 71 N. Y. 92; *Bushnell v. Carpenter*, 92 N. Y. 270; *Matter of Young*, 145 N. Y. 535; *Goebel v. Wolf*, 113 N. Y. 405; *Traver v. Schell*, 20 N. Y. 89.) The trust deed made by Mary King to J. Berre King, as trustee, in favor of herself, was invalid as against these plaintiffs as creditors of Mary King. (*Parker v. Corwin*, 15 J. & S. 522.) The will of Martha King suspends the power of alienation for more than two lives in being at the creation of the estate and is, therefore, contrary to our statute and void, and the real estate of which she died seized in the state of New York passed to her heirs at law. (*Lynes v. Townsend*, 35 N. Y. 561; *Lee v. Tower*, 124 N. Y. 370; *White v. Howard*, 46 N. Y. 144; *Haynes v. Sherman*, 117 N. Y. 4; *Schettler v. Smith*, 41 N. Y. 328; *Fowler v. Ingersoll*, 127 N. Y. 472; *Benedict v. Webb*, 98 N. Y. 460; *Matter of Tompkins*, 154 N. Y. 634; *Matter of Fargo v. Squiers*, 154 N. Y. 250.) The executors and trustees of Vincent C. King are not necessary or proper parties to this action. (*Finck v. Berg*, 50 Hun, 211.)

John M. Stoddard for respondent Palsr. Even if the legal effect of the residuary clauses of the will of Martha King is a devise to her executors as trustees, the trust is for one life only and is valid. (*Moore v. Lyon*, 25 Wend. 119; *Kelly v. Kelly*, 61 N. Y. 47; *Stevenson v. Leslie*, 70 N. Y. 515; *Vanderpoel v. Loew*, 112 N. Y. 167; *Henderson v. Henderson*, 113 N. Y. 1; *Fargo v. Squiers*, 154 N. Y. 250; *Hawley v. James*, 16 Wend. 60; *Ward v. Ward*, 105 N. Y. 75; *Green-*

land v. Waddell, 116 N. Y. 234; *Benedict v. Webb*, 98 N. Y. 460.) The will of Martha King creates no express trust, and none need be implied, for all the duties imposed and the powers conferred on the executors of the said will can be performed under a power. (*Robert v. Corning*, 89 N. Y. 225; *Post v. Hover*, 33 N. Y. 593; *Henderson v. Henderson*, 113 N. Y. 1; *Durfee v. Pomeroy*, 154 N. Y. 583; *Cook v. Platt*, 98 N. Y. 36; Chapin on Sus. of Alienation, §§ 145, 157, 288; *Everett v. Everett*, 29 N. Y. 39; *Converse v. Kellogg*, 7 Barb. 590; *Steinway v. Steinway*, 163 N. Y. 183.) Any recovery against the devisees or heirs of Martha King is barred by the Statute of Limitations of New Jersey. (*Butler v. Johnson*, 111 N. Y. 204; *Schutz v. Morette*, 146 N. Y. 137.) This action was barred by the Statute of Limitations of New York. (*Adams v. Fassett*, 149 N. Y. 61; *Hulbert v. Clark*, 128 N. Y. 295; *Murdock v. Waterman*, 145 N. Y. 55; *Harper v. Fairley*, 53 N. Y. 445; *Mills v. Davis*, 113 N. Y. 247; *Roseboom v. Billington*, 17 Johns. 181; *Grey v. Grey*, 47 N. Y. 552; *Tooley v. Bacon*, 70 N. Y. 34; *Lockwood v. Fuwett*, 17 Hun, 146; *Butler v. Johnson*, 111 N. Y. 204.)

William C. Beecher and *Richard B. Kelly* for respondents King. The heirs or devisees of a decedent cannot be held liable except for a valid and existing indebtedness of said decedent, and then not jointly but respectively to the extent of, and only to the extent of, the real property received by such heirs or devisees. (Code Civ. Pro. §§ 1843, 1846, 1847; *Selover v. Coe*, 63 N. Y. 438.) There was no right of action against Mary King at the time she died. (*Murdock v. Waterman*, 145 N. Y. 55, 64; *Mack v. Anderson*, 165 N. Y. 529; *Van Keuren v. Parmelee*, 2 N. Y. 523; *McMullen v. Rafferty*, 89 N. Y. 456; *Kelly v. Webber*, 27 Hun, 8; *Shoemaker v. Benedict*, 11 N. Y. 176; *City Nat. Bank v. Phelps*, 86 N. Y. 484; *Smith v. Ryan*, 66 N. Y. 352; *Acker v. Acker*, 81 N. Y. 143; *Littlefield v. Littlefield*, 91 N. Y. 203.) The two payments of the mortgage interest by the defendant

George R. King, one of the sons of Mary King, did not revive the debt as to his deceased mother, nor as to her estate, nor did he thereby render himself liable therefor. It most certainly did not bind the other defendants. (*Hulbert v. Clark*, 128 N. Y. 295; *Littlefield v. Littlefield*, 91 N. Y. 203; *Murdock v. Waterman*, 145 N. Y. 55; *Crow v. Gleason*, 141 N. Y. 489; *Schutz v. Morette*, 146 N. Y. 137; *Butler v. Johnson*, 111 N. Y. 204.) The trust deed made by Mary King to J. Berre King, as trustee, was valid and conveyed the full legal title. (*Townshend v. Frommer*, 125 N. Y. 446.) Mary King did not die seized of the real estate in question, nor of any part thereof. No part of said real property descended to the defendants from or was devised to them by Mary King. (Chaplin on Sus. of Alienation, 38; *Guernsey v. Guernsey*, 36 N. Y. 267; *Smith v. Edwards*, 88 N. Y. 92; *Dana v. Murray*, 122 N. Y. 604; *Paget v. Melcher*, 156 N. Y. 399; *Moore v. Littel*, 41 N. Y. 66; *Dougherty v. Thompson*, 167 N. Y. 472; *Matter of Cramer*, 170 N. Y. 271; *Selover v. Coe*, 63 N. Y. 438.) As to the defendants (children of Mary King) not only is the debt outlawed by the General Statute of Limitations, but this present action is barred as not brought within the time allowed by law for the bringing of such action. (*Church v. Olendorf*, 49 Hun, 439; *Sanford v. Sanford*, 62 N. Y. 553; *Butler v. Johnson*, 111 N. Y. 204; *Adams v. Fassett*, 149 N. Y. 61; *Mead v. Jenkins*, 27 Hun, 570; 95 N. Y. 31.) No estate, interest or right in the real property in question descended to the defendants King from, or was devised to them by, Martha King. (Code Civ. Pro. §§ 1843, 1852.)

CULLEN, J. This action is brought under sections 1837 to 1860 of the Code of Civil Procedure (which are a substitute for the provisions of the Revised Statutes) to recover of the defendants as heirs at law of Mary King and Martha King, deceased, the amount unpaid on a promissory note given by said deceased with others to the testator of the plaintiff's assignor, one Asahel Matteson, on September 4th, 1877, for

the sum of \$8,000, payable one year after date with interest payable semi-annually. To secure the payment of the note the parties executed a mortgage of real property in the state of Rhode Island. Interest was paid thereon to March 4th, 1898, when default having been made the mortgaged land was sold on October 26th of the same year, resulting in a deficiency of \$2,566.77. The real property in this state upon which it was sought to charge the plaintiffs' claim came to Mary King and Martha King by the following devise in their father's will: "I give, devise and bequeath unto my said wife, Eliza, all my estate, both real and personal, whatsoever and wheresoever, for and during her natural life and no longer. At the death of my said wife I give, devise and bequeath my said estate, real, personal and mixed, whatsoever and wheresoever, unto my three daughters, Mary and Martha King and Margaret M. Palser, to them and to their heirs and assigns forever, in joint and equal proportions, share and share alike. Should either of my said daughters die during the life of my said wife, without leaving lawful issue, then I give, devise and bequeath the share or proportion of such deceasing daughter or daughters to the survivors or survivor of my said three daughters, as the case may be, and to the heirs and assigns of such survivors or survivor." The testator's widow, the life tenant, Eliza King, died May 5th, 1895. Mary King, one of the remaindermen, died in the lifetime of her mother, on January 15th, 1890, leaving as her only heirs at law the defendants J. Berre King, Jerome A. King and George R. King. Martha King died May 11th, 1895, without issue, leaving a will, the validity of which is challenged. Her heirs at law were two brothers, the defendant C. Volney King and one Vincent C. King, who died prior to the commencement of this action, and nephews and nieces, to wit, the three defendants King, already mentioned, sons of Mary King, and the defendants Palser, the children of a deceased sister. The action was brought against the defendants J. Berre, Jerome and George King as heirs at law of their mother, Mary King, and against all the defendants as heirs at law of Martha King, the plaintiffs charging that the

will of Martha King was invalid, and that the real estate passed as in case of intestacy. Neither Mary King nor Martha King left any personal property within this state, nor were any letters of administration issued on their estates. The defendants answered, all pleading the Statute of Limitations, the children of Mary King admitting the intestacy of Martha King, while the other defendants pleaded her will and averred that it was valid and effectual to pass the property. The trial court rendered judgment for the plaintiff as against all the defendants, holding that the will of Martha King suspended the absolute power of alienation for more than two lives in being, and was, therefore, void. In compliance with the statute the recovery was apportioned between the several defendants, according to their respective interests, proceeding on the theory that Martha King died intestate. The defendants King and the defendant George N. Palsler appealed from this judgment to the Appellate Division, where it was reversed and a new trial granted as to the appellants.

I shall first consider the liability of the defendants who are the sons of Mary King. It is contended by their counsel that they took as devisees under the will of their grandfather. This position cannot be sustained. The will contains a present gift to the remainderman on the death of the life tenant. That remainder was vested subject to be divested in only one contingency, the death of the remainderman without issue prior to that of the life tenant. That contingency has not occurred for Mary King left issue, and hence the gift over did not take effect. There is no substitutional gift in favor of the issue of a remainderman, nor does the gift over raise by implication a devise to such issue. It is unnecessary, however, to discuss this further as we think that judgment was properly reversed as to these defendants for another reason pointed out in the opinion of the Appellate Division. Mary King in her lifetime made a conveyance of all her property to a trustee whereby she reserved to herself the income during life, and on her death gave the remainder to her children. Her sons, therefore, did not inherit the property as heirs at

law of their mother but acquired it under the trust deed. The learned counsel for the plaintiffs contends that this conveyance was fraudulent as against Mary King's creditors. But this claim does not help them here. Under section 232 of the Real Property Law an action may be maintained by a creditor to set aside a conveyance made by a deceased person as fraudulent, but such action must be brought, not for himself individually, but on behalf of all the creditors of the deceased, which is not the present action. Moreover there is neither finding nor proof that the conveyance of Mary King was made with intent to defraud her creditors, and it may be that at the time of its execution the mortgaged property was amply sufficient to pay the plaintiff's note.

To determine the rights of the other defendants it is necessary to consider the provision of Martha King's will which is assailed. She first directed that all mortgages, notes, moneys, real estate and life insurances, whatsoever and where-soever, belonging to her should be equally divided among her three nieces and two nephews, the defendants Palsen. By the seventh clause she further directed that her executors should take care of and manage the said estate, paying the income to said nephews and nieces semi-annually "until the youngest survivor of my said nieces and nephews shall arrive at the age of thirty years, when I direct my executors or the survivors or survivor of them to divide and pay over the residue of my estate to my said nieces and nephews, to the survivors or survivor of them." It is contended by the counsel for the plaintiffs that by this provision the absolute ownership of the personal property and the power of alienation of the real property might be suspended for five lives and, therefore, it contravenes our statute. To this claim the Appellate Division answered that there was no proof as to the ages of these beneficiaries at the time of the death of Martha King, and that it might well be that none were then under the age of thirty years. The court was also inclined to think that by the proper construction of the will the term "the youngest survivor" referred to the youngest nephew or

niece who might survive the testator, not the one who should reach the age of thirty years, in which view there would be no suspension for more than one life. We think the first answer of the Appellate Division to the plaintiffs' claim is conclusive, but refrain from passing on the second, because it appears that the question is involved in a litigation between other parties. It follows, therefore, that the plaintiffs did not establish that Martha King died intestate, and no recovery could be had against any of the defendants as her heirs at law.

For the reasons last stated the judgment was properly reversed against the defendant C. Volney King; but should it have been reversed in favor of the defendant George M. Palser? I think there is no such inconsistency between an action under the Code to charge heirs and one to charge devisees that an action brought against parties in one capacity must necessarily fail if it appears that the property has come to them in the other capacity. The question of the validity of a will is often, as in the present case, a very doubtful one. It is generally best determined in litigation directly between the persons who are interested in upholding it and those interested in nullifying it. I do not see why a creditor must decide that question at his peril if he establishes that in one capacity or the other, either as heir at law or devisee, the defendants are liable to respond to his claim. If the plaintiffs had recovered a larger sum from the defendant Palser as heir at law than the latter would be liable for as devisee, doubtless the judgment establishing such liability would necessarily be reversed. But the contrary is the situation here. If the will of Martha King is upheld, the interest in her real property passing to the defendant Palser is several times as great as that which would come to him as heir at law. The will also shows that none of her real estate passed to her heirs at law, for the devise is of all. This is a full compliance with the requirements of section 1849 of the Code of Civil Procedure. The plaintiffs were satisfied with their recovery against the defendant Palser, and, as long as they were satisfied, it should

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

not have been disturbed when the only change on a new trial would be to increase its amount.

In the opinion of the Appellate Division there is discussed the question whether the Statute of Limitations barred the plaintiff's claim. The trial court made no finding on that subject, and, as the reversal by the Appellate Division is not stated to have been on the facts, the subject is not before us for review. (*National Harrow Co. v. Bement & Sons*, 163 N. Y. 505.) We may say, however, that the evidence clearly establishes that the plaintiffs' demand against Mary King and against her estate was barred by the Statute of Limitations and equally clearly that their claim against Martha King and her estate was not so barred. The statute of New Jersey where Martha King resided is in effect the same as ours and bars a claim on a simple contract for the lapse of six years. But the common-law rule prevails there the same as here that payments will prevent the running of the statute, as will appear by reference to the decisions of the court of that state. Martha King's letters established such payments within the statutory period.

The order of the Appellate Division as to the defendants King should be affirmed and judgment absolute rendered in their favor against the plaintiff, with costs. As to the defendant George N. Palsen the order should be reversed and the judgment of the trial court against that defendant affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and VANN, JJ., concur.

Ordered accordingly.

JAMES SWEENEY et al., Composing the Firm of D. SWEENEY'S SONS, Appellants, v. THE CITY OF NEW YORK, Respondent.

INTEREST — WHEN CONTRACTORS ARE ENTITLED TO, FROM DATE OF PRESENTATION OF CLAIM. In an action upon a contract for work done and materials furnished, which provided that plaintiffs were to be allowed a specific price for each item of labor or materials furnished, they are entitled upon recovery to interest upon their claim from the time of their demand for its payment.

Sweeney v. City of New York, 69 App. Div. 80, reversed.

(Argued January 20, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 25, 1902, modifying and affirming as modified a judgment in favor of plaintiffs entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

L. Laflin Kellogg and *Alfred C. Petté* for appellants. Interest was properly allowed upon the plaintiffs' recovery from the time the claim sued upon was presented to the comptroller for settlement and adjustment up to the time of the entry of the judgment. (*Adams v. Fort Plain Bank*, 36 N. Y. 255; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 463; *Mygatt v. Wilcox*, 45 N. Y. 306; *Parrott v. K. I. Co.*, 46 N. Y. 361; *Morgan v. Skiddy*, 62 N. Y. 319; *Taylor v. Mayor, etc.*, 67 N. Y. 87; *De Carricarti v. Blanco*, 121 N. Y. 230; *Spalding v. Mason*, 161 U. S. 375; *N. & L. Co. v. B. & L. Co.*, 61 Fed. Rep. 237.)

George L. Rives, Corporation Counsel (*Theodore Connolly* and *Terence Farley* of counsel), for respondent. In actions for breach of a contract, where the damages are unliquidated,

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

interest is not to be allowed upon the damages unless they are such as might be easily ascertained and computed at the time of the breach from facts which are then known to exist. (1 Sedg. on Dam. [8th ed.] § 297; *Adriance v. Brooks*, 13 Tex. 279; *C. M. Co. v. W. M. Co.*, 151 U. S. 317; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Spalding v. Mason*, 161 U. S. 375; *White v. Miller*, 78 N. Y. 393; *McMaster v. State*, 108 N. Y. 542; *Mansfield v. N. Y. C. & H. R. R. Co.*, 114 N. Y. 331; *Gray v. C. R. R. Co.*, 157 N. Y. 483; *Sloan v. Baird*, 12 App. Div. 481; 162 N. Y. 327; *Crawford v. M. & E. P. Co.*, 22 App. Div. 54.) The damages in suit are unliquidated. (8 Am. & Eng. Ency. of Law [2d ed.], 542; *McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 463.) The rule that an unliquidated claim bears interest from the date of a demand for its payment, and from that time on the debtor is in default, has no application. (*Holmes v. Rankin*, 17 Barb. 452; *Cutter v. Mayor*, 92 N. Y. 166; *Goff v. Rehoboth*, 2 Cush. 475; *Marsh v. Fraser*, 37 Wis. 149; *Tucker v. Grover*, 60 Wis. 240; *Carpenter v. New York*, 44 App. Div. 230; *Deering v. New York*, 51 App. Div. 402; *Doyle v. St. James' Church*, 7 Wend. 178; *Shipman v. State*, 44 Wis. 458.) Interest does not run on a claim for unliquidated damages until it is merged in judgment. (*Reid v. R. G. Factory*, 3 Cow. 393; 5 Cow. 587; *Holmes v. Rankin*, 17 Barb. 454; *Gallup v. Perue*, 10 Hun, 525; *Pursell v. Fry*, 19 Hun, 595; *Littell v. Ellison*, 63 Hun, 624; *Matter of Hartman*, 13 Misc. Rep. 486; *De Witt v. De Witt*, 46 Hun, 258; *Smith v. Velie*, 60 N. Y. 106; *De Curricarti v. Blanco*, 121 N. Y. 230.) In order to entitle the plaintiffs to interest from the time of their demand, it was also incumbent upon them to establish that it was not disputed in good faith; where the contrary appears, interest is not recoverable until liquidation. (*Moshier v. Shear*, 15 Ill. App. 342; *The Isaac Newton*, 1 Abb. Adm. 588; *Shipman v. State*, 44 Wis. 458.)

CULLEN, J. In March, 1899, the plaintiffs entered into a contract with the commissioner of buildings of the borough

of Manhattan for tearing down the walls, removing the debris and recovering the dead bodies from the ruins of the Windsor Hotel, in the city of New York, which at that time had been recently destroyed by fire. The contract did not prescribe any gross sum to be paid for the work, but the plaintiffs were to be allowed a specific price for each item of labor or materials furnished by them, as, for instance, so much a day for shorers, so much for trucks, so much a thousand feet for timber. After the completion of the work, to wit, on June 29, 1899, the plaintiffs presented a claim for such work in excess of a hundred thousand dollars to the comptroller of the city of New York, by whom it was rejected. Thereupon this action was brought, in which the referee awarded to the plaintiffs for their work the sum of \$79,229.93, with interest from the third day of May, 1899. On appeal the Appellate Division reduced the judgment entered on the report of the referee by disallowing the interest which accrued prior to the referee's report, which bore date February 15, 1901. From that judgment the plaintiffs have appealed to this court, seeking to reinstate the original judgment.

I think the action of the learned Appellate Division cannot be sustained consistently with the settled law of this state as to the allowance of interest. Ever since the cases of *Van Rensselaer v. Jewett* (2 N. Y. 135) and *McMahon v. N. Y. & Erie R. R. Company* (20 N. Y. 463) the rule has been established that in actions to recover for services rendered, materials furnished or goods sold, the plaintiff is entitled to interest on his claim from the time of his demand for its payment. (See *Mygatt v. Wilcox*, 45 N. Y. 306; *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361; *Morgan v. Skiddy*, 62 N. Y. 319; *Taylor v. Mayor, etc., of N. Y.*, 67 N. Y. 87, and *de Carricarti v. Blanco*, 121 N. Y. 230.) In *White v. Miller* (78 N. Y. 393) there is to be found a full discussion of the leading authorities in this state on the subject of interest. Judge EARL there said: "The cases last cited tend to show that where an account for services, or for goods sold and delivered, which has become due and is payable in money,

although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running; and that, if not demanded before, the commencement of suit is a sufficient demand to set the interest running from that date." In *de Carricarti v. Blanco* (*supra*) the statement of Judge EARL which I have quoted is accepted as enunciating the correct rule of law on the subject.

The cases cited in the opinion of the learned Appellate Division are not in conflict with the rule laid down by Judge EARL. The principle of awarding interest has been extended to the case of unliquidated damages for breach of an executory contract of sale where the property has a market value. *Gray v. Central R. R. Co. of N. J.* (157 N. Y. 483) and *Sloan v. Baird* (162 N. Y. 327) were cases of that character. In neither case was interest allowed to the plaintiff. The decisions, however, proceeded on the express ground that the property the subject of the contract of sale was of such a peculiar character as to have no well-defined market value. In *Delafield v. Village of Westfield* (41 App. Div. 24; affirmed without opinion by this court, 169 N. Y. 582) the plaintiff's claim was on a *quantum meruit* for labor and materials furnished under a contract which had been broken by each party. The claim was subject to reduction for damage caused the defendant by the plaintiff's breach of contract and improper performance of his work. The defendant's set-off was unliquidated, and the plaintiff's recovery was necessarily dependent on the amount of that set-off. Interest was, therefore, allowed to neither party. The claim now before us is not so peculiar in its character as to take it without the general rule. The price to be paid for each class of labor or material was fixed by the contract, and the amount due to the plaintiffs was merely a matter of computation. If there was difficulty in ascertaining the quantities of labor and material furnished it proceeded from the failure of either party to keep accurate account of the work done. Doubtless this to some extent placed the city at the mercy of the contractors, and it had to rely on their integrity. Such, however, is usually the case where one has work

done on a *quantum meruit* and neglects to accurately supervise the performance of the work ; and the situation thus presented is not peculiar or exceptional.

The referee erred in allowing interest from May 3, 1899, the time of the completion of the work, instead of from June 29, when the demand was made upon the comptroller of the city. This error has been discovered by the parties, and the plaintiffs have stipulated that in case interest is awarded to them, a deduction of \$739.53 shall be made from the judgment given by the referee.

The judgment of the Appellate Division should, therefore, be reversed, and the judgment entered upon the report of the referee, subject to such deduction, affirmed, with costs to the appellants in the Appellate Division and in this court.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and WERNER, JJ., concur ; O'BRIEN, J., absent.

Judgment reversed.

MARY PFEIFER, as Administratrix of HYNEK OPITZ, Deceased,
Appellant, v. THE SUPREME LODGE OF THE BOHEMIAN
SLAVONIAN BENEVOLENT SOCIETY OF UNITED STATES,
Respondent.

1. MUTUAL BENEVOLENT SOCIETY — ACTION BY ADMINISTRATRIX AS QUASI TRUSTEE FOR BENEFICIARIES OF DEATH BENEFIT. The administratrix of a deceased member of a mutual benevolent society who "is entitled in case of his death to the receipt by his heirs" of a specified fund, and she being one of the beneficiaries, may maintain an action to recover the fund as a *quasi* trustee for those represented by the word "heirs," which is not used in its strictly technical sense as representing persons entitled to inherit real estate, but rather as indicating the next of kin entitled to the fund.

2. PAYMENT TO ITS OWN TRUSTEE DOES NOT RELEASE SOCIETY FROM LIABILITY. The payment by "The Supreme Lodge of the Bohemian Slavonian Benevolent Society of the United States" of the amount of a death benefit raised by assessment upon all its subordinate lodges, to a trustee designated to receive it by the grand lodge of the state of New York and a subordinate lodge of which the intestate was a member, does not release it from liability to the proper beneficiaries in an action against

the society brought by his administratrix for their benefit to recover such amount.

3. WHEN ISSUANCE OF CERTIFICATE SHOWING MEMBER ENTITLED TO BENEFIT IS NOT A CONDITION PRECEDENT TO RECOVERY. The fact that the constitution of such society provides that an applicant for benefits "must state to whom the death benefit shall be paid in case of his death," does not require the issuance by the society of a certificate designating the beneficiary and showing that the member is entitled to the benefit, as a condition precedent to a recovery in such action, where he was a member prior to the adoption of such provision and another provision excepts "members of the order who are members entitled to the death benefit," thus excepting existing members from the operation of the former provision.

4. ADMISSIONS OF LIABILITY. A death notice sent to the defendant by the subordinate lodge of which the intestate was a member and by the grand lodge of the state of New York reciting that he had paid up to the time of his death all dues "and is, therefore, entitled to benefit in the sum of one thousand dollars," taken in connection with the fact that the defendant levied the assessment, raised the amount and transferred it to the selected trustee in the state of New York, constitutes a clear admission of the liability of the defendant in such an action.

Pfeifer v. Sup. Lodge of Bohemian S. B. Society, 74 App. Div. 630, reversed.

(See 87 Misc. Rep. 71.)

(Argued January 26, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 15, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Paul Jones and *Francis J. Nekarda* for appellant. The contract, having been made for the benefit of no designated beneficiary, but inuring, by its terms, upon the death of a member, entitled to the death benefit, to "his heirs," the designation of a beneficiary is not a condition precedent to the plaintiff's right of recovery herein. (*Bishop v. Grand Lodge*, 112 N. Y. 627; *Wokal v. Belsky*, 53 App. Div. 167; *Elmer v. M. B. Ins. Co.*, 64 Hun, 639.) There is nothing

contained in the defendant's constitution and by-laws which imposed upon the plaintiff's intestate the duty of specifically designating a beneficiary as a condition precedent to her right to recover in this action, and the trial court erred in dismissing the complaint upon this ground. (*Kent v. Q. M. Co.*, 78 N. Y. 159; *Parish v. N. Y. P. Exch.*, 169 N. Y. 34; *Weiler v. E. A. Union*, 92 Hun, 277; *Roberts v. Cohen*, 60 App. Div. 259; *F. L. & T. Co. v. Aberle*, 19 App. Div. 79; *Moan v. Normile*, 37 App. Div. 614; *Ireland v. Ireland*, 42 Hun, 212; *Wokal v. Belsky*, 53 App. Div. 167; *Walsh v. M. L. Ins. Co.*, 133 N. Y. 408; *Bishop v. Grand Lodge*, 112 N. Y. 627.)

Michael Schaap and *Edward Hymes* for respondent. The deceased was not entitled to a death benefit, having failed to comply with the provision requiring him to execute or obtain a certificate designating a beneficiary. (*Hellenberg v. I. O. B. B.*, 94 N. Y. 580; *Eastman v. P. M. R. Assn.*, 62 N. H. 555; *K. M. M. Ins. Co. v. Miller*, 13 Bush, 494; *Worley v. N. W. M. A. Assn.*, 3 McCrary, 53; *Maguire v. Maguire*, 59 App. Div. 143; *Markey v. Supreme Council*, 70 App. Div. 4; *Kunkel v. W. S. & B. B. Fund*, 68 App. Div. 385; *Fink v. Fink*, 171 N. Y. 616.) If any one has a cause of action for the collection of this fund it is not this plaintiff (Opitz's administratrix) but his next of kin. (*Worley v. N. M. A. Assn.*, 10 Fed. Rep. 227.)

BARTLETT, J. There is no disputed question of fact. The defendant is a mutual benevolent society, having among other objects that of mutual aid of its members in sickness and in death. The provision in case of the death of a member is secured by a system of insurance for which provision is made in the constitution and by-laws.

It is stipulated that the intestate, Hynek Opitz, became a member of this order January 3d, 1880, and continued in that relation until his death June 28th, 1892, he then being forty-two years of age.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

Notices of his death were sent to the supreme lodge, the defendant herein, by the subordinate lodge and the grand lodge of the state of New York, respectively, informing the defendant of Opitz's death; that after the receipt of these notices by the defendant it duly levied and apportioned an assessment among all its subordinate lodges for the purpose of raising one thousand dollars, death benefit; that this sum was raised and placed in the hands of a trustee designated to receive it by the grand lodge of the state of New York and the subordinate lodge of which the intestate was a member.

The Appellate Division affirmed, without opinion, the judgment of the Trial Term dismissing the complaint on the merits, adopting the opinion of the trial judge.

The grand lodge of the state of New York, when notifying the defendant of intestate's death, stated, among other things, that he was accepted in its lodge on the fourth day of January, 1880, and had paid up to the time of his death all dues, and was entitled to a benefit in the amount of one thousand dollars. The subordinate lodge of which he was a member also made a like statement when giving notice of his death to the defendant.

The trial judge, after holding that this action was properly instituted as to parties, decided that the intestate clearly came within the general provisions of the constitution and by-laws, requiring, as a condition precedent, every one who desired benefits to apply for a certificate in which he must designate the person or beneficiary to whom the insurance was to be paid.

The counsel for the defendant further insists that in any event the collection of this insurance fund cannot be made by the intestate's administratrix, but the action should be brought by his next of kin.

In *Bishop v. G. L. E. O. of M. A.* (112 N. Y. 627) a very similar situation was presented. In that case the action was brought by the widow, as administratrix of the intestate, who was entitled individually, with her two infant children, to the fund. While the question was not technically raised in this

court as to the right of the plaintiff to maintain the action the court nevertheless decided it. The court there said: "It is true the fund does not come into her hands technically and strictly as assets of the estate of her intestate, nor is it to be liable for his debts. But the plaintiff, in her capacity as administratrix, represents both herself and those others who are entitled to receive the fund as its intended beneficiaries, for it comes to them by reason of the membership of the deceased, and the plaintiff is a *quasi* trustee for her children, and as administratrix represents them in this action."

So in the case before us, under the constitution (Article VI, subdivision (b) Benefits in case of death, § 1), it is provided: "That every member who has become entitled to the death benefit (before he has reached the age of forty-five years) in accordance with the provisions and rules of this division, and who complies with their requirements, is entitled in case of his death to the receipt *by his heirs* of one thousand dollars from this Order when the fact of his death has been ascertained by an official death certificate."

The plaintiff, as administratrix, is a *quasi* trustee for those who are represented by the word "heirs," which is not used in its strictly technical sense as representing persons entitled to inherit real estate, but rather as indicating the next of kin entitled to the fund.

The counsel for the defendant makes the further point that the supreme lodge of the United States sued in this action is not a proper party; that having raised money by assessment from subordinate lodges and sent it to the trustee authorized to hold the same in the state of New York, its responsibility is at an end.

The learned trial judge, whose opinion was adopted by the Appellate Division, has considered in detail the provisions of the constitution and by-laws, and reached the conclusion that, reasonably interpreted in favor of the insured, the defendant rests under the obligation to see that the fund reaches the proper beneficiaries.

We agree with the opinion of the trial judge in this respect,

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

adopt its reasoning, and will not repeat it in detail at this time.

We are unable to agree, however, with the learned court below in its decision that the issuing of a certificate designating a beneficiary was a condition precedent to a recovery.

The appellant argues that as the intestate had been in contract relations with the defendant for about eleven years when the constitution and by-laws were adopted at the Iowa convention of 1891, the obligations of that contract could not be impaired by the subsequent enactments.

This is the undoubted rule of law, but as the respondent makes answer that the plaintiff has set up the existing constitution and by-laws in her complaint, we will rest our decision upon her rights thereunder.

We have already quoted from the constitution (Article VI, subdivision (b), Benefits in case of death, § 1) that "Every member who has become entitled to the death benefit (before he has reached the age of forty-five years), in accordance with the provisions and rules of this division, and who complies with their requirements, is entitled, in case of his death, to the receipt, by his heirs, of one thousand dollars from this Order, when the fact of his death has been ascertained by an official death certificate."

The defendant relies upon article VI, section 4, of the constitution, reading as follows: "Every one who desires to become entitled to these benefits must make a written application to his lodge and produce a physician's certificate, of the form provided by the Supreme Lodge, and must state to whom the death benefit shall be paid in case of his death. The lodge shall send such application to the secretary of the Supreme Lodge, who, if he finds the physician's certificate satisfactory, shall issue a certificate showing that the said member is entitled to the said benefit. This certificate shall be attested by the secretary and president of the Supreme Lodge. No member shall be considered entitled to this benefit until this certificate shall have been approved by the Supreme Lodge and properly attested."

From these provisions it is argued that the certificate indicating the beneficiary is a condition precedent to any right of action against the defendant in case of the death of a member.

The fallacy of this argument is shown by article VI, section 8, which reads: "To members of the Order who are members entitled to the death benefit, before the adoption and entrance into effect of the provisions of this article, the Supreme Lodge shall, without exception, issue certificates without expense. To that end all applications with the name of the heir must be made within sixty days after this constitution goes into effect."

We thus have existing members clearly excepted from the operation of section four.

It is true that section eight provides that applications, with the name of the heir, must be made by existing members within sixty days after the constitution goes into effect, but there is no penalty in case this is not done, while the earlier portion of the section imposes upon the supreme lodge the duty to issue the certificates without exception or expense.

It is also to be observed that the certificate to be issued by the supreme lodge is not required to contain the name of the heir, as the section strictly read requires that the application shall contain this information.

Further, it will be seen that section eight recites, "members entitled to the death benefit," showing that existing members, who had paid their dues and were in good and regular standing, were entitled to the benefits of this insurance.

The provisions of sections four and eight make clear the meaning of section one already quoted. That section evidently contains a provision intended to indicate the beneficiaries in a general way, who were to take in case the deceased member had made no designation. As we have already suggested, the word "heirs" is equivalent to next of kin in this connection.

The constitution and by-laws are inartificially drawn in many respects and require liberal judicial construction in favor of the insured.

The construction sought to be given by the defendant to the provisions of the constitution already quoted is exceedingly narrow and results in a forfeiture of vested rights, which the law does not favor.

The intestate had been a member of this order for upwards of twelve years at the time of his death; had regularly paid his dues and thereby assisted in paying death losses during that entire period.

The result reached by the construction of the defendant is unjust in the extreme, and can only be permitted by a court of law when the language admits of no other conclusion.

It seems quite impossible that it should have been the design of the drafters of this constitution that the mere clerical act of issuing a certificate to the insured was a condition precedent to the recovery of the death benefits by his next of kin. If such a provision were presented in definite terms, it would be a mere trap for the heedless and ignorant and calculated to defeat the benign objects of this charitable order.

The officers of the defendant had but to inspect their books, or those of subordinate lodges, to acquaint themselves with the fact that possibly a very large number of members, who had been paying their dues and contributing to the death losses for years, had neglected to apply for a death certificate. Good faith, under these circumstances, would require that notices should be sent out to these members in default and acquaint them with the fact that their insurance was in peril, assuming that the designation of a beneficiary was a condition precedent to recovering the insurance.

We have already called attention to the fact that the death notice sent to the defendant by the subordinate lodge, of which the intestate was a member, and by the grand lodge of the state of New York, recited that the intestate had paid up to the time of his death all dues, "and is, therefore, entitled to benefit in the amount of one thousand dollars."

These recitations, taken in connection with the fact that the defendant levied the assessment, raised this amount of one thousand dollars and transferred it to the selected trustee

in the state of New York, are clear admissions that the next of kin of the intestate were entitled to recover.

The judgment appealed from should be reversed, with costs to the plaintiff in all courts to abide the event, and a new trial ordered.

HAIGHT, CULLEN and WERNER, JJ. (and GRAY, J., in result), concur; PARKER, Ch. J., and O'BRIEN, J., absent.

Judgment reversed, etc.

CHARLES O. GATES, Appellant, v. WILLIAM M. DUDGEON, as
Executor of and Trustee under the Will of RICHARD
DUDGEON, Deceased, Respondent.

1. WILL — WHEN EXECUTOR AND TRUSTEE, UNDER A POWER GIVEN BY WILL, MAY DELEGATE EXECUTION OF SUCH POWER. While an executor and trustee, under a power given him by a will, may not delegate the personal trust and confidence imposed upon him by the will and must exercise the judgment and discretion with which he has been invested in the execution of the power, yet having, with full knowledge of the facts, determined to sell real estate held by him as trustee, for a certain price, he may authorize his attorney to close the sale, and any contract entered into by the latter for the sale of the property at the price fixed is valid and binding upon such executor and trustee.

2. WHAT CONSTITUTES A CONTRACT OF SALE BY LETTER. Where a letter written to the trustee by the attorney for the purchaser, at the purchaser's request, offered to take the property held by the trustee at the price fixed by him in previous interviews with the purchaser, and pay the cash for it upon the delivery of the trustee's deed therefor, without warranty, the title to be taken in the name of an agent for the purchaser, which letter was answered by the attorney for the trustee, at his request, who stated that the property was held by adverse possession only and that there was no documentary title for it, and that if the purchaser would be satisfied with such title the trustee was ready to give him the usual trustee's deed without warranty, making no objection to conveying the title to the purchaser's agent, to which letter the purchaser's attorney replied, stating that such letter stated the matter just as he and the purchaser understood it and that the terms were those which the purchaser wished him to accept on his behalf, and that, assuming that the consideration for the property, as to which the letter was silent, was the same as that previously named by the trustee, the terms as to the consideration were also accepted on behalf of the purchaser, such letters con-

N. Y. Rep.]

Statement of case.

tain a full acceptance of the terms on behalf of the purchaser and constitute a completed contract in all of its essential details, and from that time became a binding contract upon the parties which could not be revoked by a subsequent letter of the trustee to the purchaser declining to sell or convey the property.

Gates v. Dudgeon, 72 App. Div. 562, reversed.

(Argued January 23, 1903; decided February 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 29, 1902, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

David C. Bennett, Jr., for appellant. The letters constitute a contract. The second letter is the offer and the fifth the acceptance. (*Peck v. Vandermark*, 99 N. Y. 29; *L. A. V. Co. v. Lorick*, 2 L. R. A. 211; *White v. Breen*, 32 L. R. A. 127; *Doughty v. M. B. Co.*, 101 N. Y. 644; *Newton v. Bronson*, 13 N. Y. 587.) A contract for the sale of land having been established, specific performance thereof was properly granted at the Special Term. (*Bostwick v. Beach*, 103 N. Y. 414; *Baumann v. Pinckney*, 118 N. Y. 604.)

Daniel P. Hays and *Ralph Wolf* for respondent. The written correspondence does not show a meeting of the minds of the parties upon all the propositions made in the offer of the plaintiff, nor is the contract sufficient under the Statute of Frauds. (*Cooley v. Lobdell*, 153 N. Y. 596; *Mentz v. Newitter*, 122 N. Y. 491; *M., etc., R. R. Co. v. C. R. Mill*, 119 U. S. 149; *C. R. R. Co. v. Dane*, 43 N. Y. 240; *Mahar v. Compton*, 18 App. Div. 536; *B. S. Co. v. M. C. Ry. Co.*, 134 N. Y. 15; *Brown v. N. Y. C. R. R. Co.*, 44 N. Y. 79; *Hough v. Brown*, 19 N. Y. 111; *Uhlman v. Day*, 38 Hun, 298; *Myers v. Prescott*, 59 Hun, 66; *S. G. W. Co. v. Barnes & Co.*, 86 Hun, 374.)

HAIGHT, J. The order of reversal does not state that the reversal was upon the facts. We must, therefore, assume that the facts as found by the trial court remain undisturbed and that the reversal was upon the law. (Code Civ. Pro. § 1338.)

This action was brought to compel the specific performance of a contract for the sale of real estate. The trial court has found as facts that Messrs. Hays, Greenbaum & Hershfield were the duly authorized attorneys for the defendant and that the defendant authorized his said attorneys to execute a contract for the sale of the property in question. It was further found as a fact that the said attorneys, on behalf of the defendant, "promised and agreed to sell to the said plaintiff the said real property described in the complaint herein for the sum of three thousand dollars, and, in consideration of the said promise by the said defendant, the said plaintiff promised and agreed to purchase the said premises at the said sum of three thousand dollars. And it was mutually promised and agreed by and between the said plaintiff and the said defendant that the deed for said premises should be delivered and possession of the said premises be given by the said defendant and the consideration paid by the said plaintiff as soon as the arrangements could be made thereto by the attorneys for the respective parties." It was further found as a fact that, after the making of the above-mentioned contract, the defendant gave notice to the plaintiff that he would not fulfill said agreement and would not deliver the deed nor the possession of the premises. The court found, as conclusions of law, that the agreement set forth constitutes a good and valid contract for the purchase and sale of the real property described in the complaint; that there was a note or memorandum of the contract in writing expressing the consideration, subscribed by the lawfully authorized agent of the grantor, sufficient to prevent the contract from being void under the provisions of section 234 of the Real Property Law, or any other similar provision of law, and that there was a breach of the contract on the part of the defendant. Judgment was directed in favor of the plaintiff for the specific performance of the contract.

It is now contended on behalf of the respondent that the order of reversal should be sustained, for the reason that the defendant, who was contracting as the executor under a power given by the will of Richard Dudgeon, deceased, could not delegate the personal trust and confidence imposed upon him by the testator, and that, therefore, the contract made by his attorneys was void. The case relied upon to sustain his contention is that of *Newton v. Bronson* (13 N. Y. 587, 593). The rule, doubtless, is correctly stated by DENIO, Chief Judge, in that case. An executor or trustee, to whom a power has been given by a will, may not delegate his judgment and discretion in the execution of the power, but having exercised the judgment and discretion with which he has been invested, we know of no authority which prohibits him from delegating to others the performance of his determination in regard thereto. The power of executors and trustees to delegate to this extent seems to be sanctioned by Chief Judge DENIO in the case alluded to. In the discussion of this question he says: "It is urged by the defendant's counsel that the contract of sale is void, for the reason that it was made by an agent of the defendant, according to the maxim '*Delegatus non potest delegare.*' The rule of law, no doubt, is that a power of this kind is a personal trust and confidence, which cannot be committed to any other than the grantee or donee of the power. (*Berger v. Duff*, 4 Johns. Ch. R. 369.) Besides this difficulty the defendant, in his answer, denies that the agents who executed in his name the contract which the plaintiff seeks to enforce, had any authority in fact from him to execute it and the plaintiff has failed to show any power of attorney or other express authority from him to them. The last objection is fully overcome by the ample and repeated acts of acknowledgment and ratification by the defendant of the contract in question in writing as well as by parol. The evidence upon this point was quite sufficient to enable the court to decide that the agents were authorized by parol to execute the contract and the parol authority under our statute and under the statute of Illinois, which is identical

in its provisions, would be sufficient. The contract must be in writing, but where it is signed by an agent, the power to execute may be by parol," citing numerous authorities. Again he says: "The reason of the maxim '*Delegatus non potest delegare*,' however, is that in the case to which it applies the first constituent is a right to the personal judgment, care and skill of his agent. * * * In determining upon one or the other course he brought into exercise those personal qualifications on account of which he is presumed to have been selected by the testator. The law does not allow him to commit the power with which he is intrusted to another, for, perhaps, that other would bind the estate to a transaction which the former might not have considered advantageous and safe if he had acted directly upon it. The reason fails where the person actually intrusted with the authority has with the full knowledge of the facts ratified the act of one who assumed to act as his agent." It would seem, therefore, that if the executor or trustee, with full knowledge of the facts, should ratify the act of his agent or of the person acting for him as agent he could in the first instance after exercising his own judgment and discretion upon the proposed contract authorize an agent to carry it into execution. That is precisely what was done in this case. The plaintiff, through his attorney, under date of May 3, 1901, addressed a letter to the defendant, in which he offered to purchase the property in question for a sum specified. The defendant concedes that he received that letter and that he took it to his attorney and told him that his title rested on adverse possession, and on being advised by his attorney that he should ascertain whether the proposed purchaser would take that kind of a title he left the letter with his attorney, directing him to make answer thereto. Other evidence was produced on behalf of the plaintiff tending to show that the defendant had himself exercised his own judgment in determining the amount for which the premises should be sold, and that he had authorized his attorneys, Messrs. Hays, Greenbaum & Hershfield, to close the transaction. We, therefore, conclude that the power delegated to his attorneys did not

involve his judgment and discretion and that, therefore, the contract entered into by them for him was valid.

It is further contended on behalf of the respondent that there was no valid contract entered into by him or his attorneys to sell the property described in the complaint. There was no formal written contract. What there is of the transaction is disclosed by the letters that passed between the parties. The first of these letters, as we have seen, bears date May 3, 1901, and was written by Mr. Tappan, the attorney for the plaintiff, and is addressed to Mr. Dudgeon, the defendant. From it it appears that the plaintiff and defendant had had previous oral conversations with reference to the purchase of this property. In it he says: "Mr. Charles O. Gates has asked me to write you and say that he accepts your terms for the sale of the meadow and beach property which you hold as trustee, west of Peacock lane and east of the Jacob property, or in other words, without going into a full description, the premises which you and he have been talking about for the past few months. I understand and Mr. Gates understands that your terms are \$3,000 cash on delivery of deed; said deed to be a usual trustee's deed without warranty. We shall take the deed quite soon, but if you would like to have us sign a regular contract in regular form we shall be glad to do so. Mr. Gates wishes the title to be held temporarily for him by some one in this office, and when the deed is made it may as well be made out to Edward R. Finch whose residence is New York city. Very Truly Yours, (Signed) J. B. C. Tappan." This letter was, as we have already seen, received by the defendant and taken to his attorneys to be answered, and they answered as follows: "New York, May 4, 1901. J. B. Coles Tappan, Esq., No. 51 Wall St., New York City. Dear Sir.—Your letter of the 3d inst., addressed to our client, Mr. William M. Dudgeon, has been handed to us for reply. The salt meadow and beach property at Peacock's Point, L. I., referred to in your letter, forms a part of the estate of Richard Dudgeon, deceased, and Mr. William M. Dudgeon, as the executor and trustee of this estate, is desirous

of disposing of this property. We have not examined the title to the property in question, but understand that it rests on adverse possession and that there is no documentary title to it. We, therefore, beg to suggest that you look into the title, and if your client is satisfied to take it, Mr. Dudgeon is ready to give him the usual trustee's deed, without warranty. Kindly let us hear from you as soon as possible, and oblige
Very Truly Yours, Hays, Greenbaum & Hershfield.” Thereupon, the plaintiff's attorney answered under date of May 6, 1901: “Gentlemen.—I have your letter of May 4th in reference to the Dudgeon meadow and beach at Peacock's Point, Long Island. Your letter states the matter just as Mr. Gates and I understand it, and the terms therein stated are the terms which Mr. Gates wished me to accept on his behalf. Your suggestion as to my looking into the title is also accepted. Your omission to state the consideration, \$3,000, was, I presume, an inadvertence, and assuming this to be the case, the terms as to consideration also are accepted on behalf of my client. I assume that you will have no objection to Mr. Gates designating some person other than himself to take title in the first instance, as stated in my letter to Mr. Dudgeon. Very Truly Yours, (Signed) J. B. C. Tappan.” No answer was made to this letter until May 13th, 1901, at which time Hays, Greenbaum & Hershfield addressed a letter to Mr. Tappan as follows: “Your letter of the 6th instant in reference to the Dudgeon meadow and beach at Peacock's Point, received. We shall be pleased to have you confer with our Mr. Hershfield on the subject generally, at your convenience.” Thereupon, and under date of May 23d, 1901, Mr. Tappan inclosed a form of deed with the following letter: “H. Hershfield, Esq., 141 Broadway, New York. Dear Sir.—I enclose for your examination a draft of the proposed deed from Mr. William M. Dudgeon to Mr. Gates' representative, which I have drawn as I am familiar with the description and locality of the premises. Very Truly Yours, (Signed) J. B. C. Tappan.” And underneath the signature the following: “I think you may find my draft useful in

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

some way. We can close any time on short notice. J. B. C. T." Here the matter appears to have rested until the third day of June, at which time the plaintiff himself wrote the following letter to the defendant: "Lawyers are, as we well know, proverbially slow, and it does seem quite impossible for me to get any reply to my letter of May 23d, accepting your proposition regarding the sale of the three-acre piece of beach at Glen Cove. I am quite sure if you knew how much this delay hinders me in carrying out some plans you would see to it that the proper papers were signed at once. I should be pleased to see you if necessary and go over the matter, though I suppose everything is practically settled excepting the mere formal part of it. If you think it well to talk it over I shall be glad to make an appointment with you any day by telephone to this office where I am most of the day. I trust that the sickness in your family has all departed and that you and your good wife are quite recovered from the anxiety incident upon such serious illness. With kind regards to Mrs. Dudgeon and yourself, I am Very Sincerely Yours, (Signed) C. O. Gates." To this the defendant answered, under date of June 4, 1901: "Your letter of the 3d inst. is at hand. After a full consideration of the matter, I have come to the conclusion not to sell the property for sometime to come. You will appreciate the fact that I am acting in the matter in a representative capacity, having but a fractional interest of my own therein, and that I have not the sole voice therefore.

"I trust you have not been greatly inconvenienced by any delay in obtaining this, my final answer.

"Our little one is well on the road to recovery and Mrs. Dudgeon joins me in thanking you for kind inquiries and with our best wishes I am Yours Very Truly, (Signed) Wm. M. Dudgeon. Mr. C. O. Gates, 100 William Street, New York."

The trial court has found that these letters constituted a complete and valid contract. The learned Appellate Division appears to have reached a different conclusion. It is, undoubtedly, true that the courts must take into con-

sideration all of the correspondence upon the subject in determining the question as to whether the minds of the parties had met upon the essential terms of the contract. The first letter of the plaintiff, under date of May 3, 1901, contains a specific offer on the part of the plaintiff to pay \$3,000 cash on the delivery of a deed of the property without warranty. It expresses the wish of the plaintiff to take the title in the name of one Edward R. Finch. The answer of the defendant, through his attorneys, calls attention to the title of the property and then concludes to the effect that if Mr. Gates is satisfied to take such a title "Mr. Dudgeon is ready to give him the usual trustee deed without warranty." This letter was written in answer to that of the plaintiff. No objection is made to the expressed wish of Mr. Gates that the title be taken in the name of Finch. If, therefore, this was an essential feature of the contract we think that the defendant acquiesced in the request. It is true that the purchase price was not mentioned in this letter. It was, however, stated in the preceding letter and the answer indicates that if the plaintiff is willing to accept such a title as the defendant has to convey the defendant is willing to give it to him, and we think the letter clearly implies for the consideration named in the previous letter. The question, however, at this point was left open, as to whether the plaintiff was willing to accept the title and to this he, through his attorney, replies on May 6th that "Your letter states the matter just as Mr. Gates and I understand it, and the terms therein stated are the terms which Mr. Gates wished me to accept on his behalf." Here we have a full acceptance of the terms on behalf of the plaintiff, and it appears to us that it concluded a completed contract in all of its essential details, and from that time became binding upon the parties. We have looked into the correspondence which followed, but find nothing that indicates that the minds of the parties had not met upon the propositions under consideration at the time that the letter of May 6th was sent until the final letter of the defendant under date of June 4th, in which he declines to sell or con-

vey the property, and, therefore, are of the opinion that the conclusions reached by the trial court were correct.

The order of the Appellate Division should be reversed, and judgment of the trial court affirmed, with costs to the plaintiff in this court and the Appellate Division.

PARKER, Ch. J., BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Order reversed, etc.

WILLIAM M. HOES, as Administrator of the Estate of GEORGE DEAN, Deceased, Respondent, v. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellant.

1. SURROGATE'S DECREE MAY BE COLLATERALLY ATTACKED FOR FRAUD AND COLLUSION—BRINGING ASSETS OF DECEASED NON-RESIDENT INTO THE STATE IN ORDER TO PROCURE LETTERS OF ADMINISTRATION—ACTION BY ADMINISTRATOR CANNOT BE ENTERTAINED BY THE COURTS. A surrogate's decree granting to the public administrator of the county of New York letters of administration upon the estate of a non-resident who left no property within the state, but whose assets were alleged to have come therein since his death, may be attacked collaterally in an action of negligence brought by the administrator against a foreign corporation to recover damages for an accident occurring in another state, which resulted in his intestate's death, where it appears that there was collusion and legal fraud in procuring the decree by reason of the fact that property belonging to the intestate of trifling value was brought from another state for the purpose of laying a foundation for making an application for letters so that the action might be prosecuted in this state, and under such circumstances the courts of this state have no jurisdiction to entertain the action.

2. CONSTRUCTION OF ACT RELATING TO PUBLIC ADMINISTRATOR IN THE COUNTY OF NEW YORK AND SECTION 2476 OF THE CODE OF CIVIL PROCEDURE. Subdivision 2 of section 4 of chapter 230 of the Laws of 1898, relating to the public administrator in the county of New York and referring to assets which "shall arrive within the county of New York after his death," and section 2476 of the Code of Civil Procedure, defining the exclusive jurisdiction of Surrogates' Courts and referring to property "which has since his death come into the state and remains unadministered," must be construed as meaning that the assets must "arrive" or "come" into the state in good faith, in due course of business and not for the avowed object of securing a resident plaintiff who can prosecute a

negligence action against a foreign corporation on a cause of action arising in and between residents of another state.

Hoes v. N. Y., N. H. & H. R. R. Co., 73 App. Div. 363, reversed.

(Argued January 29, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 20, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry W. Taft and *Henry S. Wardner* for appellant. The plaintiff had no standing in the Supreme Court because collusion or legal fraud were practiced in the Surrogate's Court in obtaining letters of administration, and thus inducing that court to take jurisdiction of the estate of the decedent. (*Robinson v. O. S. N. Co.*, 112 N. Y. 315; *Ferguson v. Crawford*, 70 N. Y. 253; *O'Connor v. Huggins*, 113 N. Y. 511; 2 Freeman on Judgments [3d ed.], § 334; *Kohlar v. Knapp*, 1 Bradf. 241; *Matter of Schley*, 11 Phil. 139; *Martin v. Gage*, 147 Mass. 204; *Sedgwick v. Ashburner*, 1 Bradf. 105; *Christy v. Vest*, 36 Iowa, 285; *McCabe v. Lewis*, 76 Mo. 296; *Vanner v. Bevil*, 17 Ala. 286; *Matter of Hughes*, 95 N. Y. 55; *Whitford v. P. R. R. Co.*, 23 N. Y. 465; *Leonard v. C. S. N. Co.*, 84 N. Y. 48; *Higgins v. C. N. E. & W. R. R. Co.*, 155 Mass. 176.) The public administrator, in the right of his office, is without authority to maintain this action. (*Stuber v. McEntee*, 142 N. Y. 200; *Budd v. M., etc., Co.*, 69 Conn. 272.) The public administrator had no power to bring the present action merely because letters of administration were issued to him. (L. 1898, ch. 230, § 24.)

Thomas P. Wickes, *Charles R. La Rue* and *Frank W. Arnold* for respondent. The existence of the surrogate's order appointing the plaintiff administrator being undisputed, the validity of that appointment cannot be questioned collaterally in this action for any cause whatsoever, as such an attack is permissible only in a direct proceeding to vacate the surro-

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

gate's order. (*Bolton v. Schriever*, 135 N. Y. 65; *O'Connor v. Huggins*, 113 N. Y. 511; *Martin v. D. D., E. B. & B. R. R. Co.*, 92 N. Y. 70; *Leonard v. C. S. N. Co.*, 84 N. Y. 48; *Kelly v. West*, 80 N. Y. 139; *Wetmore v. Parker*, 52 N. Y. 450; *Lowman v. E., C. & N. R. R. Co.*, 85 Hun, 188; *Brown v. Landon*, 30 Hun, 57; 9 N. Y. 634; Woerner on Am. Law of Administration [2d ed.], 145, 204, 266; Van Fleet's Coll. Attack, §§ 573, 805.) The validity of the plaintiff administrator's appointment cannot be impugned, because that appointment has not been shown to have been made without jurisdiction, or to have been otherwise irregular. (Code Civ. Pro. § 2476; L. 1898, ch. 230; *Matter of Hughes*, 95 N. Y. 55; *White v. Nelson*, 2 Dem. 265; *Van Giessen v. Bridgford*, 83 N. Y. 348.) There is no force in the attempted questioning of the plaintiff administrator's capacity to sue, for the court, both having no cause for attack, and also lacking the power to attack his appointment collaterally, finds itself bound by the administrator's statutory authority to recover, for the next of kin, damages for the intestate's death. (*Leonard v. Columbia S. N. Co.*, 84 N. Y. 48; *Hoes v. T. R. R. Co.*, 5 App. Div. 151; *Hoes v. O. S. Co.*, 56 App. Div. 259; 170 N. Y. 581; Code Civ. Pro. § 1902.)

BARTLETT, J. The public administrator of the county of New York brings this action against the defendant, The New York, New Haven and Hartford Railroad Company, a Connecticut corporation, to recover damages for its alleged negligence in causing the death of one George Dean, who was killed in a head-on collision while acting as an engine driver on one of the trains.

The jury rendered a verdict in favor of the plaintiff for five thousand dollars, and the Appellate Division has affirmed the judgment entered thereon with a divided court.

At the close of the plaintiff's case a motion was made to dismiss the complaint on this ground, among others: "That the Public Administrator has not the power to commence an action of this kind in this State."

At the close of all the evidence this motion was renewed on the previous and additional grounds: "(6) That the Public Administrator has no power to bring such a suit as this under the circumstances; (7) that his appointment as administrator with the other persons existing, who were competent to be appointed in that capacity, was null and void; (8) that the letters were null and void because the surrogate was without any jurisdiction upon the undisputed facts; (9) that no written notice was given, such as is required under the Connecticut statutes."

Section 1780 of the Code of Civil Procedure provides when a foreign corporation may be sued. It reads: "An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: 1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated in the State, at the time of the making thereof. 2. Where it is brought to recover real property situated within the State or a chattel, which is replevined within the State. 3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State."

As the defendant is a foreign corporation, the parties all residents of, and the accident occurred in, the state of Connecticut, there was no jurisdiction in the Surrogate's Court of New York to issue letters of administration on the estate of the intestate, unless he died leaving assets in this state or that should come into it after his death.

The appellant insists that the plaintiff has no standing in the Supreme Court because collusion or legal fraud was practiced in the Surrogate's Court in obtaining letters of administration and thus inducing that court to take jurisdiction of the estate of the decedent.

The point is also taken that the public administrator, as

such, is without power to maintain this action, and that his authority in the premises is in no way enlarged merely because letters of administration were issued to him.

The counsel for the plaintiff insists that the defendant cannot attack collaterally the decree of the surrogate adjudging that letters of administration issue.

Section 2473 of the Code of Civil Procedure, contained in chapter 18 on Surrogates' Courts and proceedings therein, provides as to presumption of jurisdiction as follows: "Where the jurisdiction of a Surrogate's Court to make, in a case specified in the last section, a decree or other determination, is drawn in question, collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and, *in the absence of fraud or collusion*, conclusively, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the Surrogate's Court. The fact that the parties were duly cited is presumptively proved by a recital to that effect in the decree."

It is quite obvious that the only attack the defendant could make upon the surrogate's decree is a collateral one, based on the allegation of fraud or collusion, as it was not a party to the proceeding in the Surrogate's Court and has no standing therein to make a direct attack.

In the case of *Ferguson v. Crawford* (70 N. Y. 253) the question as to when a judgment may be attacked was thoroughly examined by this court and the authorities reviewed; it was held that under the system of practice established by the laws of this state, the want of jurisdiction may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it, and the bare recital of jurisdictional facts in the record of the judgment by any court is not conclusive, but only *prima facie* evidence, and may be disproved by extrinsic evidence. (*Hood v. Hood*, 85 N. Y. 561, 578; *Freeman on Judgments* [4th ed.], vol. 1, § 117.)

In *O'Connor v. Huggins* (113 N. Y. 511) the question was discussed as to the binding nature of a surrogate's decree upon

the parties to the proceeding. This court said (p. 516): "His adjudication, in the exercise of his general and exclusive jurisdiction, where jurisdictional facts, necessary to the possession of that jurisdiction, appear to have been alleged, and when the necessary parties have been duly cited to appear before him, is not thereafter open to collateral attack. Power to affect the adjudication resides in the court which made it, and in the court to which it may be appealed; but otherwise it is not open to question. This principle, of course, in its application to other parties affected, *implies the absence of fraud or collusion.*"

Throughout the proceedings the defendant has persistently insisted that there was, on the undisputed evidence, collusion and legal fraud in procuring the surrogate's decree of the county of New York, which resulted in the issuing of letters of administration on the estate of the intestate to the public administrator.

Anna Dean, widow of the intestate, was sworn for the defendant and testified as follows: "My husband left property within this State; in New York State. It was a watch and chain. I cannot say how it happened to come here. I do not know who brought it here. I believe he had it on his person at the time he was killed. He did not leave it in this State, I think. I cannot say for sure how it got here. My brother might have got it here or had it sent here. * * * That is the only property that he had in this State."

James F. Noonan testified on behalf of the defendant as follows: "I did bring property of Mr. Dean into this State after he had died. A watch and chain. I brought them into the State about three or four months after he died. Mr. Wickes told me to bring it into the State. He did not tell me for what purpose. I did tell my sister that I had brought it into the State. I did not tell her for what purpose. * * * I think he did tell me that he wanted me to bring that watch into the State so as to give foundation for making an application for letters of administration here so suit could be brought here instead of Connecticut. I think

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

that is right. And I think I brought it for that purpose and for no other. I did not take it out of the State immediately after letters had been granted. It is still in the possession of Mr. Wickes. I do not know that it is in Mr. Wickes' possession. I have been informed that it is in the safe of the Public Administrator."

It further appears in the record that all the personal property of the intestate, wherever situated, did not exceed the sum of fifty dollars, and that the watch and chain brought into this state were of the value of twenty-five dollars.

Mr. Wickes, here referred to, has acted throughout as counsel for the plaintiff.

We have thus presented, on undisputed facts, a most important question of law.

Is it possible, by a device so simple and transparent as the one here disclosed, to confer upon the Supreme Court of this state jurisdiction to try a negligence action having its origin in the state of Connecticut and between a corporation and residents of that state?

If this can be done it will open wide the floodgates of litigation in similar cases, establish a new legal industry and impose thereby upon our already overworked courts the obligation to try actions imported from a foreign jurisdiction.

It was well said in *Robinson v. Oceanic Steam Navigation Co.* (112 N. Y. 315, 323) as follows: "The discrimination between resident and non-resident plaintiffs is probably based upon reasons of public policy, that our courts should not be vexed with litigations between non-resident parties over causes of action which arose outside of our territorial limits. Every rule of comity, and of natural justice, and of convenience is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose or the subject-matter of the litigation is situated within this State."

In view of the clear declaration of the witnesses, already quoted, that this trifling article of personal property, not exceeding in value twenty-five dollars, brought into this state by the advice of plaintiff's counsel, in order to furnish a

foundation on which to apply for letters of administration, so that this action could be brought here rather than in the state of Connecticut, we have presented a case of collusion and legal fraud in the proceedings before the surrogate.

We do not regard the counsel for the plaintiff as guilty of actual fraud, for what he did he did openly and with a claim of legal right, but, by an error of judgment, he was led to adopt a course of procedure that amounted to collusion and legal fraud.

It cannot be said, as matter of law, that this effort to create assets in this state brought this case within either the Laws of 1898 (Chap. 230, § 4, subd. 2), being the act in relation to the public administrator in the county of New York, or section 2476 of the Code of Civil Procedure, defining the exclusive jurisdiction of Surrogates' Courts.

The act of 1898 refers to assets which "shall arrive within the county of New York after his death," and the section of the Code referred to speaks of property "which has since his death come into the State and remains unadministered."

These provisions should be construed as meaning that the assets must "arrive" or "come" into the state, in good faith, in due course of business, and not for the avowed object of securing a resident plaintiff who can prosecute a negligence action against a foreign corporation on a cause of action arising in, and between residents of, another state.

The plaintiff's counsel points out that in *Matter of Hughes* (95 N. Y. 55) this court sustained the jurisdiction of the surrogate based upon assets irregularly brought here. This court in its opinion states that the removal of the assets from the state of Pennsylvania was illegal, but as it had been found that this act was without wrongful intent, that there were no unpaid creditors in Pennsylvania, and that the only persons interested in the distribution of the estate were in New York, the assets would not be returned to the foreign jurisdiction.

In Woerner on the American Law of Administration (second edition), at page (star) 442, the rule is laid down as follows: "Property brought into the State for collusive pur-

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

poses, or temporarily, after the owner's death, does not confer jurisdiction to grant administration thereon." (Citing *Christy v. Vest*, 36 Iowa, 285; *Varner v. Bevil*, 17 Ala. 286.)

Our attention has been called to no case in this court involving precisely the question now presented.

It may be safely assumed that this is a pioneer case, in an effort to enlarge the jurisdiction of the courts of this state, and, in view of its fate, will be valuable, not only as a precedent, but a warning.

The learned Appellate Division said in its opinion: "We think, therefore, that at this stage of the litigation, after judgment entered, the discretion exercised by the court in entertaining the action should not be disturbed."

The trial court was confronted by no question of discretion, but by a question of law, resting on undisputed evidence, going to the jurisdiction; the disposition made of that question presents legal error reviewable by this court.

We recognize the hardship imposed upon the widow and next of kin by the reversal of the judgment at this stage of the proceedings, but the grave questions involved of public policy and orderly procedure leave the court no choice.

The counsel for the appellant challenges the power of the public administrator to act under the letters of administration issued to him, and insists that it was no part of his official duty to act as plaintiff herein.

The decision of this point and others presented on the argument is unnecessary, as the views we have already expressed dispose of this appeal.

The judgment and order appealed from should be reversed and the complaint dismissed, with costs to the defendant in all the courts.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ., concur.

Judgment and order reversed.

LYDIA HABERLE SCHLERETH, Individually and as Executrix of and Trustee under the Will of PETER FUCHS, Deceased, Respondent, v. LYDIA MATHILDA SCHLERETH, Respondent, and SUSANNA DIETRICH et al., Appellants.

WILL—SUSPENSION OF THE POWER OF ALIENATION—WHEN TRUST INVALID BECAUSE TERM THEREOF CANNOT BE MEASURED BY TWO LIVES IN BEING AT DEATH OF TESTATOR. A testator, whose only next of kin and heir at law was a married daughter whose only living issue was an infant daughter born about two months after testator's death, left a will giving all of his property to his executors in trust, directing them to sell his real estate and hold the proceeds thereof, together with his invested personal property, in trust, for the following purposes:

"1. (VI) To pay the income thereof to the daughter during her life;

"2. (VII) After her death leaving issue, to pay over said income to such issue in equal shares until the youngest of such issue shall have attained the age of twenty-one years and then to divide and distribute the whole trust fund so held among such issue in equal shares, each share and share alike;

"3. (VIII) In case the daughter dies without leaving issue, to pay over the whole trust fund to the children of his brother-in-law and sister, share and share alike;

"4. (IX) In case the daughter dies leaving issue, but none should reach the age of twenty-one years, to divide and distribute the whole trust fund among the children of his said brother-in-law and sister."

Held, that the trust provisions must be construed by the rules applicable to personal property, and since it is obvious from the 7th and 9th clauses that the trust fund was not only to remain undivided until the youngest of the issue left by testator's daughter should attain the age of twenty-one years, and that if none of such issue should reach that age, the fund should be divided among the beneficiaries named in the 8th clause, and that it is impossible to determine, until the happening of one or the other of such contingencies, between whom the division was to be made or in whom the testator intended the title to vest, the absolute ownership of the trust fund could not vest during the minority of the youngest child that should be born to testator's daughter during wedlock; consequently, the term during which such ownership was to be suspended was not to be measured by two lives in being at the death of the testator, but by the life of his daughter, and then by the majority of the youngest child that should have been born to her and be living at the time of her death, and might be suspended during the life and minority of a person not in being

N. Y. Rep.]

Statement of case.

at the death of the testator; the attempted trust, therefore, is in contravention of the statute and void except in so far as it creates a trust for the life of testator's daughter.

Schlereth v. Schlereth, 78 App. Div. 283, affirmed.

(Argued January 15, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 27, 1902, which affirmed a judgment of Special Term construing the will of Peter Fuchs, deceased.

The facts, so far as material, are stated in the opinion.

Anthony B. Porter and *John B. Pannes* for appellants. The testator's intentions for the disposition of his estate appear by the will and should be carried out if possible. (*Matter of Steinway*, 163 N. Y. 183; *Matter of Tilden*, 130 N. Y. 29; *Matter of Mead*, 135 N. Y. 255; *Matter of Bowdich*, 138 N. Y. 222.) The 8th clause of the will is valid, as it is not dependent upon an invalid clause, nor is it in itself repugnant to the statute; it should be retained and read with the valid 6th clause. (*Williams v. Conrad*, 30 Barb. 524; *Matter of Tilden*, 130 N. Y. 29; *Matter of Steinway*, 163 N. Y. 183.) Valid and invalid provisions of a will may be separated and the instrument enforced accordingly. (*Matter of Kalisch*, 166 N. Y. 368; *Matter of Clark*, 160 N. Y. 313; *Matter of Tilden*, 130 N. Y. 29; *Matter of Kennedy*, 105 N. Y. 134.)

Isaac Moss for plaintiff, respondent. The will creates an equitable conversion of all the property of the testator into personalty, and the trusts therein must, therefore, be construed under the provisions of the Revised Statutes governing personal property. (*Phelps v. Pond*, 23 N. Y. 69; *Powers v. Cassidy*, 79 N. Y. 602; *Lent v. Howard*, 89 N. Y. 169; *Greenland v. Waddell*, 116 N. Y. 234.) The absolute ownership of personal property is suspended under the trusts created by this will within the meaning of the statute. (*Converse v. Kellogg*, 7 Barb. 590; *Steinway v. Steinway*, 10 Misc. Rep.

563.) The suspension of the absolute ownership of personal property, caused by the creation of the trusts, for the issue of the plaintiff, in the 7th paragraph of this will, is repugnant to the statute and illegal and void, because it is measured, not by lives in being at the death of the testator, but by lives in being at the death of a person other than the testator, to wit, the plaintiff herein. (*Greenland v. Waddell*, 116 N. Y. 234; *Adams v. Berger*, 18 N. Y. Supp. 33.) The trusts herein are rendered still more repugnant to the statute by being limited upon the lives not only of the children but of all the issue of the plaintiff. (*Palmer v. Horn*, 84 N. Y. 516; *Matter of Hopkins*, L. R. [9 Ch. Div.] 131; *Soper v. Brown*, 136 N. Y. 244.) The trusts herein are subject to the further infirmity that they may continue for the lives of more than two persons and thus violate the provision of the statute forbidding any suspension for more than two lives. (*Benedict v. Webb*, 98 N. Y. 460; *Chaplin on Susp. Power of Alienation*, 57; *Hawley v. James*, 16 Wend. 62; *Greenland v. Waddell*, 116 N. Y. 234; *Adams v. Berger*, 18 N. Y. Supp. 33.) That the suspension herein might terminate within two minorities does not avoid the statute. A suspension to be good must terminate within the prescribed period. (*Knox v. Jones*, 47 N. Y. 389; *Haynes v. Sherman*, 117 N. Y. 433.) The power of sale given to the executors and trustees herein cannot remove the ban of the illegal suspension, as the proceeds of the sales must be held upon the trusts established by the will. (*Brewer v. Brewer*, 11 Hun, 147; *Hobson v. Hale*, 95 N. Y. 588; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337.) The invalid trusts cannot be upheld as powers in trust. (L. 1896, ch. 547, § 79; *Tilden v. Green*, 130 N. Y. 29.) The intervening trusts for the issue of the plaintiff being invalid, the contingent remainders to the appellants Dietrich and Lenz, based upon the default of such issue reaching the age of twenty-one years, created by the 9th paragraph of the will, must fall with them. (*Greenland v. Waddell*, 116 N. Y. 234; *Adams Case*, 18 N. Y. Supp. 33.) Appellants err in contending that if the 8th paragraph be permitted to stand alone, the intention of the

N. Y. Rep.] Opinion of the Court, per MARTIN, J.

testator will be substantially carried into effect. (*Greenland v. Waddell*, 116 N. Y. 234; *Clark v. Cammann*, 160 N. Y. 315.) The 8th paragraph is only a subordinate part of the general scheme of this will, and must stand or fall with the whole. (*Clark v. Cammann*, 160 N. Y. 315; *Tilden v. Green*, 130 N. Y. 29.)

David B. Luckey and *John J. Schwartz* for defendant, respondent. The trusts created under this will for the issue of the plaintiff and the contingent remainders limited to the defendants Dietrich and Lenz, upon the default of the issue of the plaintiff reaching the age of twenty-one years, appear to be illegal and void. (*Greenland v. Waddell*, 116 N. Y. 234; *Adams v. Berger*, 18 N. Y. Supp. 33.)

MARTIN, J. This action was to procure a construction of certain portions of the will of Peter Fuchs, deceased. He died December 29, 1898, leaving no widow, but leaving a daughter, the plaintiff in this action, who is his only next of kin and heir at law.

The testator's estate consisted of both real and personal property. After bequeathing certain specific personal property to the plaintiff, the rest and residue of the personal, and all his real, property was given by his will to his executors and trustees, in trust, to sell and dispose of the residuary estate, real and personal, retaining as investments such as may consist of mortgages, and after the payment of his debts to hold the proceeds derived from such sale and the mortgages retained, in trust, for the following purposes:

1. (VI) To pay the income thereof to the plaintiff during her life;

2. (VII) After her death leaving issue, to pay over said income to such issue in equal shares until the youngest of such issue shall have attained the age of twenty-one years and then to divide and distribute the whole trust fund so held among such issue in equal shares, each share and share alike;

3. (VIII) In case the plaintiff dies without leaving issue,

to pay over the whole trust fund to the children of his brother-in-law and sister, share and share alike;

4. (IX) In case the plaintiff dies leaving issue, but none should reach the age of twenty-one years, to divide and distribute the whole trust fund among the children of his said brother-in-law and sister.

After the testator's death all the real property, except one lot, was sold, and the proceeds thereof became a part of the trust fund. The defendant Lydia Mathilda Schlereth is a daughter of the plaintiff and her only living issue. She was born in lawful wedlock on the thirteenth day of February, 1899, was *en ventre sa mere* at the death of the testator, and is now an infant about four years of age. The testator's will was duly admitted to probate on the twenty-sixth day of January, 1899. The United States Trust Company, Max F. Keller and the plaintiff were named as executors and trustees therein, but the plaintiff alone qualified and was and still is the sole acting executrix and trustee. She was married November 17, 1895, to Dr. William Schlereth, by whom she had three children: Irene, born April 16, 1897, and died September 16, 1898; Edgar, born February 3, 1901, and died August 24, 1901, and Lydia Mathilda, born February 13, 1899, and who is still living.

On the trial the plaintiff contended that the trust attempted to be created by the testator's will, with the exception of that contained in the sixth clause, was illegal and void because it created a suspension of the absolute ownership of the testator's personal property for more than two lives in being at his death; that a valid trust was created for the life of the plaintiff, but otherwise he died intestate, and that the property of the testator vested at his death in the plaintiff as his sole heir at law and next of kin, subject only to the trust for her life. From this claim the defendant Lydia Mathilda did not dissent. The other defendants, however, insist that the trust for the issue of the plaintiff with a contingent remainder for themselves was valid, and also that the latter was valid even though the former was void.

The trial court held that the testator died intestate as to all his estate except as to the trust for the life of the plaintiff, and that she, as sole heir and next of kin, was entitled to the absolute ownership of all his property, subject only to the trust for her life. The defendants, other than the defendant Lydia Mathilda, appealed to the Appellate Division, where the judgment was affirmed. They then appealed to this court.

Upon the argument it was conceded by the defendant Lydia Mathilda that the seventh, eighth and ninth clauses of the will are invalid. The appellants, however, without denying that the seventh and ninth clauses are invalid, contend that in any event the eighth is valid as it is not dependent upon any invalid clause in the will or in itself repugnant to the statute, and, hence, that it should be retained and read with the sixth clause which is concedely valid.

It is practically admitted by all parties that the will under consideration worked an equitable conversion of the testator's real property into personalty. Such is the obvious effect of the provisions of the will, and, hence, it is to be construed by the rules applicable to wills of personal property. Although the defendant Lydia Mathilda is to be regarded as in being at the death of the testator, it makes no difference in the determination of the question whether there was an illegal suspension of absolute ownership or as to the validity of the seventh, eighth and ninth provisions of the will.

The seventh clause provides that after the death of the plaintiff leaving issue the trustees are to pay over the income to such issue, share and share alike, until the youngest shall have attained the age of twenty-one years, and then they are to divide the whole estate among such issue in equal shares. From this provision it is obvious that the testator intended to make a future and not a present gift. There are no words of gift therein except by a direction to the trustees to pay or divide at a future time. That under such circumstances the vesting in the beneficiaries will not take place or the future executory limitations take effect until such future time arrives,

is fully established by the decisions of this court. (*Warner v. Durant*, 76 N. Y. 133, 136; *Smith v. Edwards*, 88 N. Y. 92, 103; *Delaney v. McCormack*, 88 N. Y. 174, 183; *Delafield v. Shipman*, 103 N. Y. 463, 467; *Shipman v. Rollins*, 98 N. Y. 311; *Matter of Crane*, 164 N. Y. 71.)

Thus it is obvious that the income and *corpus* of the estate was, by the testator, intended to be applied and divided among the persons answering the description contained in the seventh clause of the will at the time when such application or division was to be made. As the gift was not a present one, but in the future, it is not to be ranked with those where the payment or division only is deferred, but is one where time is of the essence of the gift. The income being payable over in equal shares to the issue of the plaintiff surviving her until the youngest should have attained the age of twenty-one years, and then the *corpus* of the estate being divisible between them, manifestly the purpose of the testator was not only to provide for the child of the plaintiff then *en ventre sa mere*, but also to provide for any and all of her children that should be living at the time of her death. Thus the time during which the absolute ownership of the estate was to be suspended was not measured by two lives in being at the death of the testator, but by the life of the plaintiff, and then by the majority of the youngest child that should have been born to her and living at the time of her death. If this provision of the will is to be thus interpreted, then plainly absolute ownership might be suspended during the life or majority of a person not in being at the death of the testator, and is clearly in contravention of the statute.

That such was the purpose of the testator is obvious from the provisions of the seventh clause, as the trust fund was not to be divided until the youngest of the issue left by the plaintiff at her death attained the age of twenty-one years. Until that time it was not only to remain undivided, but it was likewise impossible to determine between whom the division was to be made or in whom he intended the title to vest. Moreover, that the time when it was to be determined between

whom the trust estate was to be divided was, when such youngest child should attain its majority, is rendered more manifest by the ninth clause, which provides that if none of her issue should reach that age the property should be divided between the defendants other than Lydia Mathilda. Therefore, before it could be determined to whom the *corpus* was to pass, the youngest, and, consequently, all of the plaintiff's children must have attained their majority unless they had previously died. If the will be not thus interpreted, upon the death of Lydia Mathilda and the subsequent death of the plaintiff, leaving other children who have not attained their majority, the absolute ownership would be suspended during their minority or until their death, and this would be true as to each, though there were several. Therefore, when we consider the whole will, the only conclusion that seems permissible is that it was the intent of the testator that the absolute ownership of the trust fund should not vest during the minority of the youngest child that should be born to the plaintiff during her wedlock, and, consequently, was in contravention of the statute relating to the subject.

Section two of the Personal Property Law (L. 1897, ch. 417), declares: "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator; in other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." The Real Property Law (L. 1896, ch. 547), relating to future estates provides: "Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue, living at the death of the person named as ancestor." (§ 38.) If the provisions contained in section two of the Personal Property Law are subject to the

rule prescribed by section thirty-eight in relation to future estates in real property, it would seem that the issue referred to in the seventh clause of the will should be interpreted to mean the issue of the plaintiff living at her death. Moreover, the decisions of this court seem to be to the same effect. In *Matter of Baer* (147 N. Y. 348, 354) this court held that where final division and distribution is to be made among a class the benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution is directed to be made. (*Bisson v. West Shore R. R. Co.*, 143 N. Y. 125; *Goebel v. Wolf*, 113 N. Y. 405, 411; *Teed v. Morton*, 60 N. Y. 502, 506; *Matter of Smith*, 131 N. Y. 239, 247.) In the *Baer* case the court said: "While this rule is sometimes made to yield to indications of a contrary intent in the will, yet it may be said to be a general rule." (*McGillis v. McGillis*, 154 N. Y. 532; *Clark v. Cammann*, 160 N. Y. 315; *Rudd v. Cornell*, 171 N. Y. 114, 122; *Matter of Crane*, 164 N. Y. 71.)

Thus far we have considered this question independently of the decisions in *Greenland v. Waddell* (116 N. Y. 234, 244) and *Adams v. Berger* (18 N. Y. Supp. 33), upon which the courts below relied and based their decision in the case at bar. In *Greenland v. Waddell* one B. died seized of the premises in question, leaving her surviving a brother and two sisters, S. and A., her only heirs at law, and leaving a will by which she gave her entire estate, real and personal, to her executors, in trust, with power and directions to sell and distribute the proceeds to her brother and sister S., each one-third, the income of the other one-third to be paid to A. during the joint lives of herself and husband. If she survived him she was to take the *corpus* of the fund; if she died before him leaving lawful issue the income to be paid for their benefit until the youngest should reach the age of twenty-one years, and then the principal to be paid to them; in case of the death of A. without leaving issue, or if all of said issue died before reaching the age of twenty-one, the fund to go to the brother and S. At the time of the death of the testatrix

A. had no children living. It was held that by the will there was an equitable conversion of the real estate into personalty; that the provision therein as to the children of A. was void, being in contravention of the statute forbidding the suspension of the absolute ownership of personal property for more than two lives in being, and that the testatrix died intestate as to that part of her estate. In discussing that case BRADLEY, J., said: "At the time of the death of the testatrix Mrs. Bush had no children living, and she never has had any. But assuming that she does not survive her husband, and that on her death she leaves children surviving her under the age of twenty-one years, the inquiry arises whether the limitation over to them is valid, and that depends upon the determination of the further question whether the absolute ownership would then vest in such children. If it would there would be no unlawful suspension. Otherwise it is difficult to see how the provision made for them by the will can be supported. The will does not in terms give the fund to the children, but directs the executors, in the events mentioned, to pay it to them. The postponement of the time of payment of a gift is not important, that alone will not qualify the absolute character of the ownership. The vesting of it is suspended if some period in the future is annexed to the substance of the gift. In the present case the conditions upon which the right of the children to take the fund depend are to or may arise in the future, beyond the time of the death of the mother, and the contingency is uncertain. The children must reach the age of twenty-one years, and if they do not, the fact that the direction is that the fund go to Mr. Boerum and Mrs. Vandever is not consistent with the vesting of the absolute ownership in the children on the death of their mother. It is, therefore, clear that, in the case supposed and which may arise if Mrs. Bush should leave children her surviving, the observance of the direction of the will will operate to suspend the absolute ownership of the fund for some period of time after her death. (*Batsford v. Kebbell*, 3 Ves. 363; *Patterson v. Ellis*, 11 Wend. 259; *Warner v. Durant*, 76 N. Y. 133;

Delaney v. McCormack, 88 N. Y. 174, 183.) Such suspension being for a time not dependent upon lives and not more than two in being at the time of the death of the testatrix renders the limitation over void unless it is saved by some provision of the statute. We find none in its support. While the suspension of the absolute power of alienation of real estate may be extended beyond two lives limited so as to embrace the period of minority of a child to whom the remainder is limited, and such suspension may be created by a contingent limitation of the fee, our attention is called to no statute qualifying in that or any manner the effect of the provision before referred to limiting the time of suspension of the absolute ownership of personal property. The consequence seems to be that the direction of the testatrix by her will to pay the fund to such children in the event mentioned or on their failure to arrive at the age of majority to pay it to Mr. Boerum and Mrs. Vandever was in contravention of the statute and void. (*Manice v. Manice*, 43 N. Y. 303.)" (*Woodgate v. Fleet*, 64 N. Y. 566, 572; *Beardsley v. Hotchkiss*, 96 N. Y. 201.) The case of *Adams v. Berger* is to the same effect.

Thus we see that the *Greenland* case was in all essential respects identical with the case at bar. As it seems to have never been questioned or disapproved, but to have been in principle sustained by many other cases, I think it is decisive of this case, that the decisions of the courts below were correct and should be affirmed, with costs to all parties payable out of the trust fund.

PARKER, Ch. J., BARTLETT, HAIGHT, VANN and WERNER, JJ., concur; GRAY, J., absent.

Judgment affirmed.

WILLIAM T. GILBERT, as Receiver of COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY, Respondent, v. EDWARD L. FINCH et al., Appellants.

1. **CORPORATIONS — LIABILITY OF DIRECTORS FOR WASTE OF FUNDS — JOINT TORT FEASORS.** The payment of the funds of an insurance company by its directors to the incorporators of a foreign insurance corporation which was not a stock corporation, and who had no interest therein that could be the subject of a sale, and who divided the proceeds among themselves in consideration of the assignment by them of their interest in the corporation, their resignation as incorporators and the substitution of such directors or their representatives in place of the incorporators, is a misappropriation of the moneys of the company, operating to waste its funds, and constitutes such directors wrongdoers, and among themselves joint tort feasors, and they are liable for the amount so paid out; the incorporators, having no property rights to transfer, or if they had, having converted the money to their own use, are also wrongdoers, and among themselves joint tort feasors.

2. **EQUITY — WRONGDOERS NOT ENTITLED TO COMPEL CONTRIBUTION OR TO ENFORCE SUBROGATION.** An instrument purporting to be a release of the incorporators by a receiver of the insurance company, who had brought an action against them to recover the payment, executed upon a compromise, by which he obtained a portion of his claim, but providing that "the execution of this instrument shall not affect any cause of action of the receiver against any person not named therein," does not relieve the directors of the company from liability when sued by him to recover the balance, upon the ground that if required to return the money paid to the incorporators they would become in equity entitled to subrogation to the rights of the plaintiff and entitled to recover it, and that the release would operate to deprive them of this right, since being wrongdoers equity would not compel contribution or enforce subrogation.

3. **INSTRUMENT IN EFFECT A COVENANT NOT TO SUE DOES NOT RELEASE JOINT TORT FEASORS.** Nor will the defendants be relieved from liability upon the ground that the so-called release was a settlement of the entire claim, and that its effect was to discharge them, upon the theory that all the defendants and the incorporators were joint tort feasors, since, assuming them to be such, the instrument containing an express reservation of the right to sue any person not named therein, is in effect a covenant not to sue the incorporators, and a covenant not to sue does not release joint tort feasors.

4. **DIRECTORS NOT RELIEVED FROM LIABILITY BY RELEASE GRANTED BY THEMSELVES TO A CO-DIRECTOR.** The fact that prior to the appointment of the receiver mutual releases were exchanged between the insur-

ance company and one of the defendants, upon the settlement of an action brought by him against the company to recover a large amount claimed to be due him, does not relieve them from liability, since even if the release by the company were authorized by its board of directors they could not waste its funds and then relieve themselves from liability by a release granted by themselves to a co-director.

Gilbert v. Finch, 72 App. Div. 38, affirmed.

(Argued January 28, 1903; decided February 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 20, 1902, reversing a judgment in favor of defendants entered upon a verdict directed by the court and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Michael H. Cardozo and *George Wilcox* for appellants. The defendants having acted in good faith, with the utmost care, without personal advantage, having no object except to increase the legitimate business of their company, are not liable in this action. (*Symmes v. U. T. Co.*, 60 Fed. Rep. 830, 853; *Morawetz on Corp.* § 553; *Leslie v. Lorillard*, 110 N. Y. 552; *Cook on Stockholders*, § 648; *Thomp. on Officers*, 233, 241; 3 *Thomp. on Corp.* §§ 4106, 4109; 2 *Cook on Corp.* [4th ed.] §§ 623, 702, 703; *Hun v. Cury*, 82 N. Y. 65; *Holmes v. Willard*, 125 N. Y. 75.) There being no evidence of any damage or loss to the defendants' company by reason of the transaction in question, there can be no recovery in this action. (*Van Dyck v. McQuade*, 86 N. Y. 38; *Holmes v. Willard*, 125 N. Y. 75; *O'Brien v. Fitzgerald*, 143 N. Y. 377; *Knapp v. Roche*, 94 N. Y. 329; *Dykman v. Keeney*, 154 N. Y. 483.) The transaction in question was not illegal on the part of the Commercial Alliance Insurance Company. (*S. H. B. Co. v. Eickemeyer Co.*, 90 N. Y. 607; *Rogers v. Pell*, 154 N. Y. 518; *Koehler v. Reinheimer*, 26 App. Div. 1; *Steinway v. Steinway*, 17 Misc. Rep. 47; *C. T. Co. v. W. Mfg. Co.*, 58 App. Div. 271; *Vought v. E. B. & L. Assn.*, 172 N. Y. 508.)

N. Y. Rep.]

Points of counsel.

The transaction in question was not illegal on the part of the Maine Company. (*Weymouth v. P. L. D. Co.*, 71 Me. 29; *Woodruff v. E. Ry. Co.*, 93 N. Y. 618; *Holmes v. Willard*, 125 N. Y. 75; *Holmes v. Holmes*, 127 N. Y. 252; *Little v. Garabrant*, 90 Hun, 404; 153 N. Y. 661; *Denike v. N. Y. & R. L., etc., Co.*, 80 N. Y. 599; *Castner v. T. C. Co.*, 91 Me. 524; *Matter of I. L. A. Soc.*, L. R. [9 Eq. Cas.] 316; *Matter of M., etc., Soc.*, L. R. [6 Ch. App.] 374; *Matter of A. L. A. Co.*, L. R. [6 Ch. App.] 381.) The Commercial Alliance Life Insurance Company and the plaintiff, its receiver, have, with full knowledge of all the facts, ratified and confirmed the transaction by retaining and using the proceeds thereof, and are now estopped from maintaining this action. (*S. H. B. Co. v. Eickemeyer Co.*, 90 N. Y. 607; *Woodruff v. E. Ry. Co.*, 93 N. Y. 609; *R. L. R. Co. v. Roach*, 97 N. Y. 378; *Veeder v. Mudgett*, 95 N. Y. 295; *Rogers v. Pell*, 154 N. Y. 518; *Moss v. Cohen*, 158 N. Y. 240.) If any liability ever existed, as claimed in the complaint, the defendants were released and discharged therefrom by reason of the settlement of the action brought by the plaintiff against the members of the Maine and New Brunswick Insurance Company and the release given to them. (*Knapp v. Roche*, 94 N. Y. 329; *Wood v. Pangburn*, 75 N. Y. 498; *Mitchell v. Allen*, 25 Hun, 543; *De Long v. Curtis*, 35 Hun, 94; *Breslin v. Peck*, 38 Hun, 623; *Brogan v. Hanan*, 55 App. Div. 92; *Chapman v. Dolner*, 77 N. Y. 51; *Simmons v. Everson*, 124 N. Y. 319; *Colgrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *Barrett v. T. A. R. R. Co.*, 45 N. Y. 628.) The general release executed and delivered to the defendant Miller for a valuable consideration is a complete defense to this action not only as to him, but as to all the defendants. (*Kirchner v. N. H. S. M. Co.*, 135 N. Y. 182; *Slayton v. Hemken*, 91 Hun, 582; *Walbourn v. Hingston*, 86 Hun, 63; *Oakes v. C. W. Co.*, 143 N. Y. 430; *Hastings v. B. L. Ins. Co.*, 138 N. Y. 479; *Powers v. S. H. & P. Co.*, 23 App. Div. 380; *Patterson v. Robinson*, 116 N. Y. 200.)

Henry D. Hotchkiss for respondent. The transaction was illegal *per se*, both as involving moral turpitude and as a violation of statute. It was in every sense void as *ultra vires* both corporations. (*McClure v. Wilson*, 70 App. Div. 152; *Huntington v. Nat. S. Bank*, 96 U. S. 388; *McClure v. Law*, 161 N. Y. 78; *Pierson v. Cronk*, 26 Abb. [N. C.] 25; 27 N. Y. S. R. 122; *Mason v. Henry*, 83 Hun, 546; 152 N. Y. 529; *Pierson v. McCurdy*, 33 Hun, 520.) Neither good faith nor due care on the part of defendants could defeat a recovery. (*People v. Ballard*, 134 N. Y. 269; *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75; *Laverty v. Snethen*, 68 N. Y. 522; *Met. El. Ry. Co. v. Man. Ry. Co.*, 14 Abb. [N. C.] 211; *Pickering v. Stephenson*, L. R. [14 Eq.] 322.) The transaction could not be and never was ratified as against this plaintiff. (*S. W. Bank v. Smith*, 51 App. Div. 259; *Morawetz on Priv. Corp.* [2d ed.] § 620; *Mason v. Henry*, 152 N. Y. 529; *Halpin v. M. B. Co.*, 20 App. Div. 583; *Wilson v. Æolian Co.*, 64 App. Div. 337; *Little v. Garabrant*, 90 Hun, 404; *People v. Ballard*, 134 N. Y. 269; *B. T. Co. v. Dessau Co.*, 45 App. Div. 475; *H. & N. H. R. R. Co. v. Crossinell*, 5 Hill, 383; *Foss v. Harbottle*, 2 Hare, 461; *Livingston v. Lynch*, 4 Johns. Ch. 573; *C. C. Co. v. Sherman*, 30 Barb. 553; *Hazard v. Durant*, 11 R. 1. 195.) The release to the Maine directors was not a bar to the present action. (*Mason v. Henry*, 152 N. Y. 529; *Mills v. Mills*, 115 N. Y. 80; *McClure v. Wilson*, 13 App. Div. 274; *Pierson v. McCurdy*, 33 Hun, 520; *Comcl. Bank v. Taylor*, 64 Hun, 499; *Whittemore v. J. L. & S. O. Co.*, 124 N. Y. 565; *Knapp v. Roche*, 94 N. Y. 329.)

HAIGHT, J. This action was brought by the plaintiff, as receiver of the Commercial Alliance Insurance Company, against the defendants, as directors of that company, to recover the sum of ten thousand dollars and interest.

The Commercial Alliance Insurance Company was incorporated under the laws of this state and continued in business until October, 1894, when the plaintiff was appointed receiver

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

in an action brought for that purpose by the attorney-general of the state. The evidence taken upon the trial tends to show that prior to the bringing of the action by the attorney-general the defendants, and other persons beyond the jurisdiction of the court, were acting as directors of the company, and that they entered into negotiations with the ten surviving incorporators of the Maine and New Brunswick Insurance Company, a corporation organized under the laws of the state of Maine, for the purchase and control of that company; that such negotiations were finally consummated on the third day of May, 1893, by the president of the Commercial Alliance Company who, acting in pursuance of the direction of the defendants and their associates, took from the funds of the company thirty-five thousand dollars and paid the same to the ten surviving incorporators of the Maine and New Brunswick Company, giving to each the sum of three thousand five hundred dollars, and taking from them a paper in which they purported to transfer and assign "all their right, title and interest as corporators, associates or otherwise in said Maine and New Brunswick Insurance Company." Simultaneously with the execution and delivery of this paper and in pursuance of that agreement, all of the officers and directors of the Maine Company resigned their places and the same were filled by the defendants or persons acting for or on their behalf. Shortly thereafter, and on the 22d day of July, 1893, the Maine and New Brunswick Company was judicially declared by the Supreme Judicial Court of Maine to be insolvent and a receiver was appointed to wind up its affairs. After the plaintiff was appointed receiver of the Commercial Alliance Company he brought an action against the ten surviving incorporators of the Maine and New Brunswick Company in the United States Circuit Court for the district of Maine to recover back the thirty-five thousand dollars which had been paid to them under the direction of the defendants. Subsequently, this action was compromised under the direction of the court, the plaintiff receiving from such surviving incorporators the sum of twenty-five thousand dollars, and he

thereupon executed and delivered to them an instrument in which he released and discharged all of the defendants in that action "from all claims or demands arising from said suit or the subject-matter thereof, and also from all claims, demands, actions and causes of action whatsoever in favor of said Commercial Alliance Insurance Company or of myself as receiver of said Company to date. The execution of this instrument shall not affect any cause of action of the receiver against any person not named herein." It also appeared upon the trial that the defendant Miller had brought an action against the Commercial Alliance Company prior to the appointment of the plaintiff as receiver, in which he claimed that a large sum of money was due and owing to him from the company. This action was settled upon the payment to him of the sum of eight thousand dollars, and thereupon mutual releases were exchanged between him and the company upon the consideration expressed therein of one dollar.

We fully concur in the conclusions reached by the Appellate Division, to the effect that the transaction by which thirty-five thousand dollars were taken from the treasury of the Commercial Alliance Company and paid over to the incorporators of the Maine and New Brunswick Company was *ultra vires* and constituted a waste of the funds of the Commercial Company, and that the defendants, who authorized such appropriation of the moneys, became liable to respond to the plaintiff in damages. We also are of opinion that the Appellate Division properly disposed of the claim of the defendant Miller under his release.

There is but one question upon which we deem further discussion necessary. That arises out of the release given by the plaintiff to the Maine incorporators upon the settlement of the action against them for twenty-five thousand dollars. It is contended by the defendants in the first place that, if they are required to return to the plaintiff the thirty-five thousand dollars which they paid or caused to be paid to the Maine incorporators, they would become in equity entitled to subrogation to the rights of the plaintiff and entitled to recover the

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

money which they had paid to the Maine incorporators and that the release would operate to deprive them of this right. In the second place, they contend that the release was a settlement of the entire claim and that its effect was to discharge them upon the theory that they were joint tortfeasors.

It is not our purpose to question the character or the motive of the defendants in carrying out the transaction. We may readily concede that they thought they were acting for the best interests of the company which they represented. They, doubtless, thought that by getting control of the Maine Company and getting themselves installed as officers they could get the policyholders in that company to transfer their insurance into the Commercial Alliance Company; but good motives and good intentions do not render the transaction valid or relieve them from liability for the wrong which they have committed. The Maine incorporation was not a stock company. Its officers had no stock in the company which they could sell or transfer, and consequently there was nothing that the Commercial Alliance Company could purchase. The thing accomplished by the transaction was the resignation of the officers of the Maine Company and the substitution of the defendants or their representatives. It was, therefore, a misappropriation of the moneys of the Commercial Alliance Company by the defendants and their associates which operated to waste the funds of the company and they thereby became wrongdoers, and among themselves joint tortfeasors. We are also of the opinion that the officers of the Maine Company also committed a wrong. If they, as officers of the Maine Company, could transfer any of the property of that company to the Commercial Alliance Company they had no right, as such officers, to divide up the thirty-five thousand dollars among themselves and put it into their own pockets. If they had no property rights which they could transfer to the Commercial Alliance Company then they had no right to take the money of that company and convert it to their own use, so that, as among themselves, they were joint tortfeasors. As to whether they were joint

tort feorsors with the defendants we do not deem it necessary to now determine, for it is our purpose to consider the question in both aspects.

If the defendants had paid the Maine incorporators thirty-five thousand dollars of their own money to resign their position in that company and have the defendants substituted in their places, we are aware of no equitable or legal principle upon which they could recover the money. They got what they purchased. They understood fully what the Maine officers had to transfer. In using the money of the Commercial Alliance Company they committed, as we have seen, a wrong upon that company, and our attention has been called to no case in which equity has enforced the right of subrogation in such a case. Indeed, we had supposed the policy of the law to be to leave wrongdoers without aid in equity from the burdens of the position in which they have placed themselves. The rule is well settled that, as among themselves, equity would not compel contribution or enforce subrogation. (*Peck v. Ellis*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige 18; *Thorp v. Amos*, 1 Sandf. Ch. 26, 34; *Pierson v. Thompson*, 1 Edw. Ch. 212, 218; *Wehle v. Haviland*, 42 How. Pr. 399, 410; *North v. Sergeant*, 33 Barb. 350, 354; *Weidman v. Sibley*, 16 App. Div. 616, 619.) We, consequently, conclude that the principles of subrogation do not apply to the defendants in this case.

In considering the effect of the release we shall assume that the defendants were joint tort feorsors with the Maine incorporators, and that the release, under seal, of a claim given to one joint tort feorsor operates as a release of all. (*Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628, 635, and cases there cited.) This rule is founded upon the theory that a party is entitled to but one satisfaction for the injury sustained by him. The claim of the plaintiff, as we have seen, was for thirty-five thousand dollars; the settlement was for twenty-five thousand dollars, leaving ten thousand dollars of the original claim unpaid and unsatisfied. The instrument given to the Maine incorporators upon the settlement of the plain-

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

tiff's suit against them released and discharged them from all further claims or demands, so far as the plaintiff was concerned, but it was expressly provided in the instrument that it should not affect any cause of action on behalf of the receiver against any other person. The purpose of this reservation is very evident. The receiver, doubtless, intended to pursue the defendants for the balance of the claim. The instrument, therefore, does not purport, neither was it intended, to be a full and complete settlement of the plaintiff's entire claim. Reservations of this character in releases are not uncommon, and their effect has been the subject of frequent adjudication by the courts. It is quite true that the courts of our sister states have reached different conclusions upon the question, and that a sharp conflict exists in the courts of our own state, as, for instance, *Matthews v. Chicopee Mfg. Co.* (3 Robt. 712); *Commercial Nat. Bank v. Taylor* (64 Hun, 499), on one side, and *Mitchell v. Allen* (25 Hun, 543); *Delong v. Curtis* (35 Hun, 94), and *Brogan v. Hanan* (55 App. Div. 92), upon the other side.

In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between joint debtors and joint tort feorsors, a release given to one releases all; but if the instrument contains a reservation of a right to sue the other joint debtor or tort feorsors, it is not a release, but in effect is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tort feorsor.

In the case of *Duck v. Mayeu* (L. R. [2 Q. B. 1892] 511) the question was as to whether the plaintiff had released a joint tort feorsor. He had accepted from one a sum of money, but without prejudice to his claim against the other. SMITH, L. J., in delivering the opinion of the court, said with reference thereto: "In determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were

held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of *Bateson v. Gosling*, at Nisi Prius, the same canon of construction was applied, and it was held that, the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the Court of Common Pleas, as reported in Law Rep. 7 C. P. p. 9."

In *Price v. Barker* (4 Ellis & Bl. 760 [E. C. L. R. vol. 82]) COLERIDGE, J., says: "With regard to the first question, two modes of construction are for consideration. One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other, that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord DENMAN in *Nicholson v. Revill* (4 A. & E. 675 [E. C. L. R. vol. 31], as explained by Baron PARKE in *Kearsley v. Cole*, 16 M. & W. 136) that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities (see *Solly v. Forbes*, 2 Br. & B. 38 [E. C. L. R. vol. 6], *Thompson v. Lack*, 3 Com. B. 540 [E. C. L. R. vol. 54], and *Payler v. Homersham*, 4 M. & S. 423 [E. C. L. R. vol. 30]) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release." (See, also, *Currey v. Armitage*, 6 Weekly Repr. [Eng.] 516.)

In the case of *McCrillis v. Hawes* (38 Me. 566) one Lewis

and the defendant were charged as joint trespassers upon the plaintiff's premises. They had taken one hundred sticks of pine timber. The plaintiff settled with Lewis for one-half of the property taken and brought action against the defendant for the other half. It was held that the action could be maintained and that the settlement was not a release as to the whole claim.

In the case of *Ellis v. Esson* (50 Wis. 138) it was held that the instrument given to one of several joint wrongdoers is not a technical release if it appears from the paper that it was not the intention of the injured person to release his cause of action against all the wrongdoers and that the sum received was not in fact a full compensation for his injury nor intended to be such by the parties to the agreement.

In *Sloan v. Herrick* (49 Vt. 327) it was held that the release of one joint tortfeasor on payment of part satisfaction, when it is expressed in the release that the sum paid is received only in part satisfaction, will not operate to bar the injured party from pursuing the other joint tortfeasor for so much of the tort as remains unsatisfied.

We have thus called attention to the English authorities and those of some of our sister states. We have also referred to some of the conflicting cases in our own courts. The question appears to have first received attention here in *Kirby v. Taylor* (6 Johns. Ch. 250, 253) in which it was held that a release is to be construed according to the clear intention of the parties, and where it contains a reservation, the other obligee was not discharged.

In the case of *Irvine v. Millbank* (56 N. Y. 635, more fully reported in 15 Abb. Pr. [N. S.] 378) the release was, by its terms, to be without prejudice to the rights of the plaintiff as against the other defendants. FOLGER, J., in delivering the opinion of the court, said that this instrument was not a technical release, which it must be to operate as a discharge of a joint tortfeasor.

And finally, in the case of *Whittemore v. Judd Linseed & Sperm Oil Co.* (124 N. Y. 565) the question was examined

by BROWN, J., and the conclusion reached that where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged.

It thus appears that the decisions of this court are in accord with the English rule and in harmony with our statute in reference to joint debtors. (Code Civ. Pro. §§ 1942, 1944.) They give force and effect to the intention of the parties to the instrument, which, we think, is more just and the wiser and safer rule. Where the release contains no reservation it operates to discharge all the joint tort feasons; but where the instrument expressly reserves the right to pursue the others it is not technically a release but a covenant not to sue, and they are not discharged. It follows that the release, so called, did not operate to discharge the defendants.

The order of the Appellate Division should be affirmed and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

PARKER, Ch. J., GRAY, BARTLETT, CULLEN and WERNER, JJ., concur; O'BRIEN, J., absent.

Order affirmed.

CARRIE E. DRAKE, as Administratrix of DELBERT M. DRAKE,
Deceased, Respondent, v. AUBURN CITY RAILWAY COM-
PANY, Appellant.

1. MASTER AND SERVANT — ASSUMPTION OF OBVIOUS RISK. The rule of the assumption of obvious risks does not rest wholly upon an implied agreement of the employee, but on an independent act of waiver evidenced by his continuing in the employment with a full knowledge of all the facts.

2. NEGLIGENCE. Where it appears upon the trial of an action for negligence that plaintiff's intestate, who was performing his duties as a conductor upon defendant's railroad, was killed by coming in contact with a tree near the track, that he had been over the road about one hundred and sixty times as a conductor and about forty or fifty trips as a motorman, and consequently was familiar with the situation, the submission to the jury of the question whether it was negligence upon the part of defend-

N. Y. Rep.]

Statement of case.

ant to maintain its road so near the line of the tree as would cause the injury complained of is reversible error, since by continuing in his employment with full knowledge of all the facts he must be deemed to have assumed an obvious risk.

Drake v. Auburn City Ry. Co., 70 App. Div. 622, reversed.

(Argued January 19, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 17, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William Nottingham for appellant. Whatever risk arose from the situation of the railroad relative to this line of trees was open and obvious and was assumed by the plaintiff's intestate when he entered the service. He could not call upon the defendant to change the location of its tracks, especially since long before the accident he became entirely familiar with the situation. (*Gibson v. E. R. Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; *Sweeney v. B. & J. E. Co.*, 101 N. Y. 520; *Hickey v. Taaffe*, 105 N. Y. 26; *Williams v. D., L. & W. R. R. Co.*, 116 N. Y. 628; *Powers v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 274; *Appel v. B., N. Y. & P. Ry. Co.*, 111 N. Y. 550; *Kennedy v. M. R. Co.*, 145 N. Y. 288.) Under the rulings and charge of the trial court the verdict may have been based, as far as the defendant's negligence is concerned, solely upon the ground that the defendant's tracks were located too near this line of trees and the latter held, therefore, liable, notwithstanding the conductor's knowledge of the situation. (*Buckley v. G. P. & R. Mfg. Co.*, 113 N. Y. 540; *Marsh v. Chickering*, 101 N. Y. 396; *Crown v. Orr*, 140 N. Y. 450; *Spencer v. Worthington*, 44 App. Div. 496; *Miller v. Grieme*, 53 App. Div. 276; *Savage v. N. E. R. R. Co.*, 42 App. Div. 241.) The plaintiff's intestate was clearly guilty of contributory

negligence. Upon the side of the car next the highway the conductor could have discharged his duties with perfect safety. Moreover, the car had been specially equipped so as to enable and induce him to take that position. But he chose the unsafe place instead, and deliberately incurred the risk of going upon the side next the trees to collect the fares. The chance thus unnecessarily taken was his own and the penalty cannot be visited upon the defendant. (*Reiser v. N. Y. & H. R. R. Co.*, 24 App. Div. 23; *Gibson v. E. R. Co.*, 63 N. Y. 449, 454; *Moylan v. S. A. R. R. Co.*, 128 N. Y. 583; *Coleman v. S. A. R. R. Co.*, 114 N. Y. 609; *Craighead v. B. C. R. R. Co.*, 123 N. Y. 391; *Murphy v. N. A. R. R. Co.*, 6 Misc. Rep. 298; *McDugan v. N. Y. C. & H. R. R. R. Co.*, 10 Misc. Rep. 336; *Crowley v. M. St. R. R. Co.*, 24 App. Div. 101; *Caspers v. D. D., etc., R. Co.*, 22 App. Div. 156, 160; *Haven v. Bridge Co.*, 151 Penn. St. 620; *Taylor v. Railroad*, 109 N. C. 236.) There is an entire absence of proof that the deceased exercised any care to avoid coming in contact with the trees. In fact it appears that he was walking along the running board toward the rear of the car with his back to them when he was struck. Under such circumstances there can be no recovery. (*Wiwirowski v. L. S. & M. S. R. R. Co.*, 124 N. Y. 420; *Weston v. City of Troy*, 139 N. Y. 281; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 248; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 N. Y. 330; *Bond v. Smith*, 113 N. Y. 378.)

Danforth R. Lewis for respondent. The defendant's right to lay its tracks and operate its cars thereon carries with it the obligation to lay them in proper manner and keep them in repair, and for the safety of its employees it is bound to use suitable care and skill in furnishing a safe and proper track and roadbed and exercise care in keeping it in repair. It was negligence for the defendant to allow and continue its roadbed and track to remain in the condition in which it was found to be at the place of this accident, and continue to operate its cars thereon when it would necessarily endanger the lives of

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

the employees when engaged in the discharge of their duties. (*Donnegan v. Erhardt*, 119 N. Y. 468; *Worster v. F. S. St. R. R. Co.*, 50 N. Y. 203; *Caughlin v. B. H. R. R. Co.*, 59 App. Div. 126; *True v. L. V. R. R. Co.*, 22 App. Div. 588.) It was negligence for the defendant to run its open cars upon the track at the place of the accident. (*Benthin v. N. Y. C. & H. R. R. R. Co.*, 24 App. Div. 303; *Brown v. N. Y. C. & H. R. R. R. Co.*, 42 App. Div. 548; *Fitzgerald v. N. Y. C. & H. R. R. R. Co.*, 88 Hun, 359.) Plaintiff's intestate did not assume the risk of injury, nor was he guilty of any negligence which contributed to the injury. (*Wallace v. N. Y. C. & H. R. R. R. Co.*, 138 N. Y. 302; *Benthin v. N. Y. C. & H. R. R. R. Co.*, 24 App. Div. 303; *Brown v. N. Y. C. & H. R. R. R. Co.*, 42 App. Div. 548; *Boyle v. D. McL. C. Co.*, 47 App. Div. 311; *Fitzgerald v. N. Y. C. & H. R. R. R. Co.*, 88 Hun, 359; *Ferrin v. O. C. R. R. Co.*, 143 Mass. 197; *I. C. R. R. Co. v. Walsh*, 52 Ill. 183; *N. Y. C. & St. L. R. R. Co. v. Ostman*, 41 N. E. Rep. 1037; *Johnston v. O. S. L. Ry. Co.*, 23 Oreg. 94; *Johnson v. S. P. M. Ry. Co.*, 43 Minn. 53.)

BARTLETT, J. On the fourth day of July, 1899, the intestate, a conductor on one of the cars of the defendant, was killed, and this action is brought by his widow, the administratrix, to recover damages.

The defendant's railroad runs southerly from the city of Auburn to Owasco lake. The northerly portion of the road is within the city limits and the remainder, for a distance of some two miles, is in the town of Owasco, running along Owasco street to a park upon the shore of the lake.

On the westerly side of Owasco street is a row of large trees for almost the entire distance from the city line to the lake.

The commissioner of highways of the town of Owasco issued a permit for the construction of this portion of the road, in which it was provided that it should be "constructed and laid upon the westerly side of said highway so that the

easterly rail of said track shall be within eight feet from the line of trees standing and growing upon the west side of said highway."

The evidence establishes that under this mode of construction the nearest point of the car to the trees was about twenty-one inches.

At the time of the accident the intestate was conducting what is known as an "open car" (this being a trolley line), with a running board upon each side, from which the conductor collected fares and discharged his general duties in the premises.

The car was running south towards the lake, and at the time of the accident the intestate was standing upon the running board on the westerly or right-hand side of the car, nearest the trees.

The evidence shows that the travel on this holiday was heavy, and at the time of the accident, between two and three o'clock in the afternoon, it was raining slightly.

The intestate had collected the fares and was engaged in adjusting a curtain, at the request of a passenger, when in some manner his head came in contact with a tree, resulting in a fracture of the skull, causing death.

There was a sharp conflict of evidence as to the condition of the track at the point where the accident occurred. The plaintiff's evidence tended to show that at this point there was a slight curve of one degree, and that the inner rail which was nearest the trees should have been depressed about one inch in order to overcome it; that, as matter of fact, this rail was depressed about four and three-quarters inches.

This condition was due, according to plaintiff's witnesses, to the dangerous and decayed condition of the ties, which were covered with dirt and sod; the fish plate that held the rails together at the joint was broken, one of the bolts gone and several spikes drawn from the ties.

If the jury believed this evidence they were justified in finding that the effect of this condition of the track was to cause the car to lean over, more or less, toward the line of trees.

There was also evidence tending to establish the fact that the tree, against which the intestate's head struck, leaned somewhat toward the track, and at the point of contact was some twelve inches nearer the track than at its base.

The defendant not only contradicted to some extent this evidence in relation to the condition of the track, but gave proof tending to show, as is contended, contributory negligence on the part of the intestate, by reason of the fact that the open cars had been provided with a signal bell cord and register rope on each side so as to enable conductors, under instructions, to avoid as much as possible the use of the running board nearest the trees.

The plaintiff in reply gave evidence to the effect that the usual way for passengers, in entering and leaving the car when traveling south in the town of Owasco, was on the westerly side; that it was a part of the conductor's duty, under the rules, to assist women and children on and off the car; and that it was quite impossible for the intestate, under the conditions existing at the time of the accident, to wholly operate his car from the easterly running board.

In this state of the record there were two questions for the consideration of the jury, on conflicting evidence, to wit, as to the condition of the track and the contributory negligence of the intestate.

It is urged by the counsel for the defendant that the trial judge erred in his charge to the jury in submitting for their consideration an additional question as to the general liability of the defendant by reason of operating its road so near the line of trees in question.

The charge bearing upon this point is as follows: "It will be for you to say whether as a fact negligence is attributable because of the condition of things. Negligence is a question of fact for the jury, and it will be necessary for you to pass upon that question. If the track was maintained so near the tree that conductors in the performance of their ordinary duties, while performing them carefully and with due regard for their own safety, were likely to receive such an injury as

this, then it is a fact upon which you may predicate negligence on the part of the defendant. If you find it to be dangerous—if you find the track to be so near the tree as alleged and likely to cause such an injury, you will be justified in saying that the defendant was negligent in maintaining its road in the position so near that object.”

The trial judge then charged the jury as to the defendant's negligence growing out of the condition of the track, concerning which there is no objection.

It was clearly error to submit to the jury the question whether it was negligence on the part of the defendant to maintain its road so near the line of trees.

It appears from the defendant's evidence that the intestate had been over the road about one hundred and sixty times as a conductor and about forty or fifty trips as a motorman, and, consequently, was familiar with the situation.

The claim of the defendant is that whatever peril existed by reason of the proximity of these trees, was, under the circumstances, an obvious risk which was assumed by the intestate.

It is well settled that the risks of the service a servant assumes in entering upon the employment of a master are only those which occur after the due performance by the employer of those duties which the law enjoins upon him. (*Benzing v. Steinway & Sons*, 101 N. Y. 552; *McGovern v. Central Vermont R. R. Co.*, 123 N. Y. 280.)

This rule, however, as to the risks of the service, or ordinary risks, in connection with the duty of the master to furnish a safe place in which a servant is to work, has no application to the situation here presented. It is often a close question to determine whether a single obstruction, located too near the track of a railroad, causing the death of an employee on a passing train, is or is not an obvious risk that he assumed.

In the case before us no such difficulty is presented; the intestate, when passing over this road frequently, was fully advised as to the proximity of the trees, and if, in his opinion,

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

there was peril in operating an open car, it was his duty to have retired from the employment; as he failed to do this, it must be held that he assumed whatever risk there was in the situation. (*Gibson v. Erie Railway Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520; *Appel v. Buffalo, N. Y. & P. Railway Co.*, 111 N. Y. 550; *Williams v. Del., L. & W. R. R. Co.*, 116 N. Y. 628; *Crown v. Orr*, 140 N. Y. 450; *Kennedy v. Manhattan Ry. Co.*, 145 N. Y. 288; *Maltbie v. Belden*, 167 N. Y. 307, 312.)

The rule of the assumption of obvious risks does not rest wholly upon the implied agreement of the employee, but on an independent act of waiver, evidenced by his continuing in the employment with a full knowledge of all the facts.

In *O'Maley v. South Boston Gas Light Co.* (158 Mass. 135) the Supreme Judicial Court of Massachusetts uses this language: "The doctrine of the assumption of the risks of his employment by an employee has usually been considered from the point of view of a contract, express or implied, but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria*, one who, knowing and appreciating a danger and voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger."

The counsel for the defendant makes the additional point that negligence on the part of the company could not properly be predicated upon the location of its tracks on the side of the street, as it had no choice in the premises, but was compelled to obey the direction contained in the permit of the highway commissioner of the town of Owasco.

Statement of case.

[Vol. 173.]

The defendant can claim no immunity by reason of the terms of this permit, and we rest our decision upon the error in the charge already pointed out.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to abide the event.

HAIGHT, MARTIN, CULLEN and WERNER, JJ. (and PARKER, Ch. J., in result), concur; O'BRIEN, J., absent.

Judgment reversed, etc.

JOHN G. O'KEEFFE, as Receiver of the MATT TAYLOR PAVING COMPANY, Appellant, v. THE CITY OF NEW YORK, Respondent.

NEW YORK, CITY OF — CONSTRUCTION OF PAVING CONTRACT — GENERAL COVENANT TO MAINTAIN AND REPAIR QUALIFIED BY A SPECIFICATION. A provision in a contract for paving certain streets in the city of New York which provided for the execution of the work in accordance with specifications therein referred to, requiring the contractor to "maintain the said work in good condition to the satisfaction of the commissioner of public works * * * for the period of fifteen years from the final completion and acceptance thereof; all the said work to be done in the manner and under the conditions hereinafter specified," and that the entire work will be completed "to the satisfaction of the commissioner of public works, and in substantial accordance with said specifications," should be read in connection with a specification providing "that if, at any time during the period of fifteen years from the date of the acceptance by said commissioner of the whole work under this agreement, the said work, or any part or parts thereof, or any depression, bunches or cracks shall, in the opinion of the commissioner, require repairs, and the said commissioner shall notify" the contractor "to make the repairs so required by a written notice served on the contractor, either personally or by leaving said notice at his residence or with his agent in charge of the work," the contractor "shall immediately commence and complete the same to the satisfaction of the said commissioner;" and when so read requires the contractor to make only such repairs as he should be required to make pursuant to the written notice served upon him in the manner specified.

O'Keeffe v. City of New York, 73 App. Div. 312, reversed.

(Argued January 27, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June

24, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry D. Hotchkiss and *L. Laflin Kellogg* for appellant. There was no unqualified covenant to repair. (*Graves v. Deterling*, 120 N. Y. 447.) The repair clauses are to be construed as covenants in the nature of a warranty, and not as conditions precedent. (*MacK. F. S. Co. v. Mayor*, 160 N. Y. 72; *Gilliam v. Brown*, 116 Cal. 454.) The general covenant to repair was limited by the subsequent special covenant. (*Dady v. O'Rourke*, 172 N. Y. 447; *Holmes v. Hubbard*, 60 N. Y. 183.) If the general provision to maintain the work in good condition be treated as a separate and distinct obligation, nevertheless, a condition that the defendant would give notice of the necessary repairs, although not expressed, will be implied. (*Norton v. N. A. G. Co.*, 69 App. Div. 10; *N. E. I. Co. v. G. El. R. R. Co.*, 91 N. Y. 153; *Booth v. C. M. Co.*, 74 N. Y. 415; *Wells v. Alexandre*, 130 N. Y. 642.)

George L. Rives, Corporation Counsel (*Theodore Connolly* and *Terence Farley* of counsel), for respondent. The so-called maintenance clause in asphalt paving contracts is not *ultra vires*, but is enforceable. (*People ex rel. v. Featherstonhaugh*, 172 N. Y. 112; *Allen v. Davenport*, 107 Iowa, 90; *Kansas City v. Hanson*, 60 Kan. 833; *Louisville v. Clark*, 20 Ky. L. 1265; *B. A. P. Co. v. Watt*, 51 La. Ann. 1345; *W. S. P. Co. v. City of St. Paul*, 69 Minn. 453; *B. A. P. Co. v. Hezel*, 76 Mo. App. 135; *S. Nat. Bank v. Woesten*, 147 Mo. 467; *B. A. Co. v. Hezel*, 155 Mo. 391; *B. A. P. Co. v. French*, 158 Mo. 534; 181 U. S. 324.) The obligation being imposed upon the contractor to maintain the pavement in good condition for the term of fifteen years from the completion of the work, it makes no difference, so far as the fulfillment of its covenant is concerned, whether or not it was notified by the

commissioner of public works that the pavement required repairs. (*Buchanan Co. v. Kirtley*, 42 Mo. 534; *Brookfield v. Reed*, 152 Mass. 568.)

WERNER, J. The single question presented by this appeal arises upon the construction of the "maintenance" clause of the contract upon which this action is brought. On the 26th of December, 1890, the Matt Taylor Paving Company entered into a contract with the defendant to pave with asphalt the carriageways of Sixty-sixth and Sixty-seventh streets from Lexington avenue to Third avenue in the borough of Manhattan, city of New York. The contract provided for the payment by the defendant to said contractor of 70 per cent of the contract price within 30 days after the completion of the work and the acceptance of the same by the commissioner of public works and the balance thereof as follows: "Three per cent of the whole amount of money accruing to the said party of the second part (the contractor) on the expiration of the sixth year, and a like further sum of three per cent upon the expiration of each succeeding year thereafter until the whole, or as much as remains due upon said contract price shall be paid, *should the party of this second part perform the work stipulated under section 13a of this agreement.*" The installment of 70 per cent of the contract price, which became due upon the completion of the work and the acceptance thereof by the commissioner of public works, has been paid; several installments of three per cent have also been paid, and 15 per cent still remains unpaid. This action was brought by the plaintiff, as receiver of the said contracting company, to recover the amount unpaid.

The contract, after providing for the execution of the work in a good and substantial manner in accordance with the specifications therein referred to, requires the contractor to "maintain the said work in good condition to the satisfaction of the commissioner of public works * * * for the period of fifteen years from the final completion and acceptance thereof; all the said work to be done in the manner and under the con-

ditions hereinafter specified," and that the entire work will be completed "to the satisfaction of the commissioner of public works, and in substantial accordance with said specifications." Section 13a of the specifications referred to provides "that if, at any time during the period of fifteen years from the date of the acceptance by said commissioner of the whole work under this agreement, the said work, or any part or parts thereof, or any depression, bunches or cracks shall, in the opinion of said commissioner, require repairs, and the said commissioner shall notify the said party of the second part to make the repairs so required by a written notice to be served on the contractor, either personally or by leaving said notice at his residence or with his agent in charge of the work, the said party of the second part shall immediately commence and complete the same to the satisfaction of the said commissioner; and in case of failure or neglect on his part to do so within forty-eight hours from the date of the service of the aforesaid notice, then the said commissioner of public works shall have the right to purchase such materials as he shall deem necessary, and to employ such person or persons as he may deem proper, and to undertake and complete the said repairs, and to pay the expense thereof out of any sum of money due the contractor, or retained by the said party of the first part, as hereinafter mentioned. And the parties of the first part hereby agree, upon the expiration of the said period of fifteen years, provided that the said work shall at that time be in good order, or as soon thereafter as the said work shall have been put in good order to the satisfaction of the said commissioner, to pay to the said party of the second part the whole of the sum last aforesaid, or such part thereof as may remain after the expenses of making the said repairs in the manner aforesaid shall have been paid therefrom."

Specification 22 of the contract provides that the party of the second part "shall not be entitled to demand or receive payment for any portion of the aforesaid work or materials until the same shall be fully completed in the manner set forth in this agreement, and such completion shall be duly

certified by the engineer, inspector and water purveyor in charge of the work, and until each and every of the stipulations hereinbefore mentioned are complied with and the work completed to the satisfaction of the commissioner of public works and accepted by him."

The complaint alleges the full performance of the contract. The answer denies this allegation of the complaint and sets forth, as a separate and distinct defense, the provisions of the contract above quoted. The answer further alleges that at various times during the years from 1894 to 1901 inclusive the said work became out of repair and required that repairs should be made thereto; that at various times during said years the contractor was notified in writing to make such repairs; that he neglected and refused to make the same, and that said commissioner of public works caused said repairs to be made by other parties. At the trial the plaintiff, after making the formal proofs relating to his appointment as receiver, his qualification as such and his authority to sue, offered in evidence the contract referred to, the certificate of the defendant's engineer showing the completion of the work in accordance with the terms of the contract, and then rested. Thereupon defendant's counsel moved to dismiss the complaint on the ground that the facts proven do not constitute a cause of action against the city. This motion was granted and plaintiff excepted.

This decision of the trial court and the affirmance by the Appellate Division of the judgment entered thereon are based on the ground that under the provisions of the contract "it was the duty of the contractor to maintain the pavement in good condition without any notice from the commissioner, and it was also his duty to make the repairs specified in section 13a upon notice from the commissioner," and that plaintiff could not establish a cause of action without showing affirmatively that he had maintained said pavement in good order for a period of fifteen years after its acceptance by the defendant. Although the question presented is a narrow one, we are inclined to differ from the learned courts below in the

construction which should be given to this contract. It should be read as a whole and its several parts construed together. The initial covenant to maintain the work provided for in this contract for fifteen years from the final completion and acceptance thereof, is qualified and limited by the provision that it shall be done in accordance with the specifications and conditions thereafter set forth. One of the specifications and conditions thus referred to (13a) provides that if "the said work or any part or parts thereof, or any depression, bunches or cracks shall, in the opinion of said commissioner, require repairs, and the said commissioner shall notify the said party of the second part to make the repairs so required by a written notice served on the contractor, either personally or by leaving said notice at his residence or with his agent in charge of the work, the said party of the second part shall immediately commence and complete the same to the satisfaction of the said commissioner." We think the reasonable construction of the covenant to repair, when read in connection with the language of the specification just referred to, is that the contractor was bound to make only such repairs as he should be required to make pursuant to the written notice served upon him in the manner specified. If the contractor was bound by a general and absolute covenant to repair, the provision for notice to him is wholly superfluous, but when both clauses of the contract are read together we are able to arrive at a construction thereof that gives effect to all its parts, and is at once reasonable and practical. According to the view adopted by the courts below, the contractor was bound to keep the streets in repair during the the whole period of fifteen years without notice or request from the defendant's officers, although no part of the pavement could be taken up without a permit from the department of public works (Consolidation Act, sec. 322, Ash's ed., p. 128), and even though it would require a constant patrol of these streets by the contractor in order to obtain information as to the necessity for repairs. Such a construction of this contract is neither reasonable nor practical. In a recent case

(*Dady v. O'Rourke*, 172 N. Y. 447) this court has reiterated a cardinal rule in the construction of contracts in language that is peculiarly applicable to this case, as follows: "One of the rules to be applied in the construction of contracts is that they shall be so construed that all parts may stand together if they are capable of such an interpretation. A covenant in large and general terms may be restrained and narrowed where the intent to restrain and narrow or qualify is apparent from other parts of the same instrument." Applying this rule to the contract before us, we are led to the conclusion that the reasonable construction of this contract is that the contractor's covenant to maintain and repair was not absolute and unconditional, but was qualified by the provisions of specification 13a which provides for the service of a written notice upon the contractor by the defendant when repairs were required to be made.

When the plaintiff rested he had made out a *prima facie* case. The burden of proof was not shifted to the defendant, but the plaintiff had proven all that was essential unless, and until, the defendant introduced some evidence which required the plaintiff to prove more. We are of opinion, therefore, that it was error to dismiss the complaint.

The judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT and CULLEN, JJ., concur; O'BRIEN, J., absent.

Judgment reversed, etc.

WILLIAM C. EARLE, Respondent, v. WILLIAM H. EARLE et al.,
as Executors of WILLIAM P. EARLE, Deceased, Appellants.

1. WHEN JUDGMENT IN AN ACTION IS NOT A BAR TO ANOTHER ACTION FOR SAME CAUSE BROUGHT BY A CO-DEFENDANT THEREIN AGAINST SOME OF THE DEFENDANTS IN FIRST ACTION. A judgment, obtained by a residuary legatee in an action against the trustees under a will for an accounting and to recover a personal judgment against them for the loss incurred by the estate through their neglect of duty, is not a bar to a similar action brought, upon substantially the same facts, by

N. Y. Rep.]

Statement of case.

another residuary legatee against such trustees for a similar judgment, although the plaintiff in the latter action was made a defendant in the former action and was served with the summons therein, where he neither appeared nor answered in the action and his rights were not litigated or adjudged therein and where his cause of action would not have been a defense to the former action, and if pleaded and proved would not have prevented the judgment that was rendered therein, although his rights could have been determined by such judgment; since the rule that a former judgment determines all the issues litigated and which might have been litigated should be limited to such matters as might have been used in the former action as a defense to an adverse claim made by the plaintiff therein or by one of the co-defendants therein of the plaintiff in the latter action.

2. ACTION BY RESIDUARY LEGATEE AGAINST TRUSTEES — MAY BE COMMENCED BEFORE DEATH OF LIFE TENANT. Such action is not prematurely brought because the life tenant was living at the time the action was commenced, where the plaintiff, as residuary legatee, had such an interest in the fund set apart for the life tenant that an action would lie to compel the trustees to account for any misuse of the fund and to make good any loss or waste thereof caused by their neglect.

Earle v. Earle, 73 App. Div. 300, affirmed.

(Submitted January 16, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 13, 1902, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hamilton Odell and *Hammond Odell* for appellants. William C. Earle was a necessary party to the action brought by his sister Cornelia. (Perry on Trusts, § 881; *Hanne v. Stephens*, 1 Vern. 110; *Mitchell v. Lennox*, 2 Paige, 280; *Petrie v. Petrie*, 7 Lans. 90; *Peyser v. Wendt*, 87 N. Y. 326; *Sortore v. Scott*, 6 Lans. 275; *Sherman v. Burnham*, 6 Barb. 403; *Matter of Robinson*, 37 N. Y. 264; *Conklin v. Davis*, 53 How. Pr. 409.) The judgment in the former action is a complete bar to this one. (*Reich v. Cochran*, 151 N. Y. 128; *Jordan v. Van Epps*, 85 N. Y. 427; *Stowell v.*

Chamberlain, 60 N. Y. 276; *Patrick v. Shaffer*, 94 N. Y. 430; *Benjamin v. E. J. & C. Co.*, 49 Barb. 441; *Pray v. Hegeman*, 98 N. Y. 351; *Lorillard v. Clyde*, 122 N. Y. 47; *Griffin v. L. I. R. R. Co.*, 12 N. Y. 452; *Masten v. Olcott*, 101 N. Y. 157.)

Carlisle Norwood for respondent. The plaintiff's cause of action is the surrogate's decree of April 25, 1861, and the will is only explanatory of the decree in so much as the latter referred to it. (*G. P., etc., Co. v. Mayor, etc.*, 108 N. Y. 276; *Taylor v. Root*, 4 Keyes, 335; *Mallory v. Leach*, 23 How. Pr. 507; *Goodrich v. Dunbar*, 17 Barb. 644; *Re E. C. R. Co.*, L. R. [4 Ch. Div.] 33; *Taylor v. Wing*, 84 N. Y. 471; *Lynde v. Lynde*, 162 N. Y. 405; *Gray v. R. B. Co.*, 40 App. Div. 506; *Eldred v. Banks*, 17 Wall. 545; *McKein v. Odum*, 12 Me. 94.) As to every claim or defense on account of the existence of which William C. Earle was a necessary party to the prior action, we concede that he is barred by the prior judgment obtained by his sister Cornelia. As to any other claim he is in the same position as if he had not been joined as a party. (Perry on Trusts, § 882; Story's Eq. Pl. § 72; *Mitchell v. Lennox*, 2 Paige, 280; *Dart v. Palmer*, 1 Barb. Ch. 92; *Petrie v. Petrie*, 7 Lans. 90; *Peyser v. Wendt*, 87 N. Y. 322; *Sortore v. Scott*, 6 Lans. 275; *Sherman v. Burnham*, 6 Barb. 403; *Matter of Robinson*, 37 N. Y. 264; *Conkling v. Davis*, 53 How. Pr. 409; *Henderson v. Henderson*, 3 Hare, 100; *Reich v. Cochran*, 151 N. Y. 128.) A judgment is conclusive in a second action only when the same question was at issue between the same parties in the former suit and the precise issue was tried and determined between such parties. (*Rudd v. Cornell*, 171 N. Y. 114; *Duchess of Kingston's Case*, 20 How. St. Tr. 355; Bigelow on Estoppel [5th ed.], 167; *Hughes v. Alexander*, 5 Duer, 488; *Fairchild v. Lynch*, 98 N. Y. 359; *R. P. Co. v. O'Dougherty*, 81 N. Y. 489; *Ferguson v. M. Ins. Co.*, 22 Hun, 320; *Willard v. M. K. & T. R. Co.*, 20 Hun, 191; *Durant v. Abendroth*, 97 N. Y. 132; *Gedney v. Gedney*, 160 N. Y. 471; *Cromwell v.*

N. Y. Rep.] Opinion of the Court, per WERNER, J.

County of Sac, 94 U. S. 353.) The defendants' testator, William P. Earle, having failed to obtain a judgment determining all of the rights between himself and the plaintiff in this action, he failed to avail himself of the only method, by pursuing which a judgment could have been got, which would have had the force which the defendants now claim for that which was actually taken. (Code Civ. Pro. § 521; *Ostrander v. Hart*, 130 N. Y. 406.)

WERNER, J. This action was brought against trustees under a will for an accounting and to recover a personal judgment against them. The defense relied upon is a former judgment in a similar action against the same defendants for the same relief, which is pleaded as a bar to this action. A brief recital of the history of both cases is necessary to an understanding of the single question involved. Morris Earle, plaintiff's father, died in 1859, leaving a will by which he appointed his brother, William P. Earle, his widow, and one Dodd, trustees of his estate. He left him surviving seven children, including the plaintiff. Through the negligence of the trustees in permitting James Earle, a son of the testator, to manage the estate, it was ultimately ruined. In January, 1879, Cornelia D. Earle, plaintiff's sister, commenced an action in the Superior Court of the city of New York against William P. Earle and Mary E. Earle, the widow, as trustees, praying that they be compelled to account; that they be made personally liable for the loss incurred by the estate through their neglect of duty, and that they be removed from their office as trustees. The other six children of the testator, including the plaintiff, were joined as defendants in that action. Judgment was had therein against the trustee William P. Earle in favor of all the children of the testator, except the plaintiff and his brothers, James and Morris, for the proportion of the estate which would have come to them had the estate not been wasted. Final judgment was entered therein March 20th, 1882. It was affirmed by the General Term of the Superior Court and by this court. (48 Supr. Ct. 18; 93 N. Y. 104.)

In December, 1883, the plaintiff commenced this action against his mother and William P. Earle, as trustees, to obtain an accounting and to recover his portion of the estate. The mother made no defense. Pending the action William P. Earle died and the present defendants, as his executors, were substituted in his place and the action revived against them. After trial in May, 1900, judgment was rendered therein in favor of the plaintiff for \$16,556.13 principal, interest and costs. The Appellate Division modified the terms of this judgment as to interest, and as thus modified affirmed it.

The answer of William P. Earle, one of the delinquent trustees, after putting in issue the allegations of the complaint as to his misconduct, pleaded the Statute of Limitations and the judgment in the action brought by Cornelia D. Earle as a bar to the present action. The trial court sustained the defense based on the Statute of Limitations and overruled the plea of a former judgment. The defense of the Statute of Limitations was directed solely against that part of plaintiff's claim which arose out of his original right to a one-seventh share in two-thirds of his father's estate and, as the plaintiff has not appealed from that part of the judgment which sustained this defense, he is bound by it. The judgment which plaintiff recovered herein is based solely upon his original right to one-seventh of the one-third of his father's estate which was set apart for the use of the widow during her life and, after her death, was to be divided equally among the plaintiff and his brothers and sisters.

The only question presented upon this appeal is whether the judgment in the action brought by Cornelia Earle, the plaintiff's sister, against these defendants as trustees, is a bar to this action. An examination of the facts of record in the former action wherein judgment was had against the trustees who were the original defendants herein, shows that the plaintiff was made a defendant in the former action and was served with the summons therein. He put in no answer, however, and there was no adjudication of his rights. Answers were put in by two of his sisters and a brother, and

N. Y. Rep.] Opinion of the Court, per WERNER, J.

their rights were passed upon. As above stated, plaintiff's father left him surviving seven children. At the time of his death two of the children were of full age and five were minors, one of whom was the plaintiff. The testator set apart one-third of his estate for the use of his widow and, upon his death, that amount was to fall into the residuary estate to be divided equally among his children as directed by the will. The other two-thirds of the estate was to be divided equally among the testator's children, and the executors were directed to invest each share thereof and apply the income of the same, or so much thereof as should be necessary, to the support and education of the child to whom the same was devised during his or her minority, and, upon such child attaining the age of twenty-one years, to pay over to him or her \$10,000.00 of the principal, and thenceforward to apply the income of the residue of such share to the use of such child until he or she should attain the age of thirty years, when the further sum of \$20,000.00 was to be paid over to him or her, the income of the remainder of the share to be applied to the use of such child until he or she should attain forty years of age, when the whole balance was to be paid over.

In 1861 an accounting was had by the executors and trustees in the Surrogate's Court, and on April 25th of that year a final decree was entered which directed that \$11,354.59 be set apart for each of the two adult children; that \$74,451.27 be set apart for the use of the widow, and the sum of \$106,772.95 be held by the trustees for the benefit of the five minor children, which class included the plaintiff. After that accounting the trustee Dodd moved out of the state and he was relieved by order of the court from further duty as an executor or trustee. Upon the trial of the former action the amounts fixed by the decree entered upon that accounting were taken as the basis for the award to be made to the plaintiff in the former action, and the three other legatees who answered therein. The judgment in that action directed, in substance, that the trustees were liable to the plaintiff and to each of the three answering defendant legatees therein for

one-fifth of the sum of \$106,772.95 of principal and one-fifth of the sum of \$2,532.15 of accumulated interest. After crediting the trustees with amounts that had been paid to said four legatees, it directed the payment of the balance to them and adjudged that the trustees be removed.

The complaint in the action now at bar sets forth the will, the surrogate's decree of 1861 above referred to, the misconduct of the trustees, and demands judgment that they be compelled to account to the plaintiff, that they may be adjudged personally liable to replace such of the assets of the estate and the income thereof as have been lost through their neglect of duty; and that they be compelled to pay the plaintiff such sums as shall be found due him.

The plaintiff became of age on September 25th, 1863, when he received the sum of \$10,000.00. He became thirty years of age on September 25th, 1872, and shortly thereafter was paid \$20,000.00 and the further sum of \$148.05. The plaintiff's mother died on August 14th, 1894. Upon the happening of that event the plaintiff became entitled, under his father's will, to one-seventh of the sum which had been set apart for the widow. That one-seventh amounted to \$10,667.27, and, with interest thereon from the date of the mother's death to the date of the decision, made a total of \$14,364.51. Plaintiff was awarded judgment for that amount and costs.

The complaint in the action brought by plaintiff's sister alleged substantially the same facts set forth in the complaint at bar. The prayer for relief in the sister's action asked that the trustees be compelled to account to her "and the other legatees" of the testator, and that they be compelled to pay to her "and the other legatees" the amounts which should be found due them respectively, and that the trustees be removed. The two sisters of the plaintiff and the personal representative of a third sister, who were defendants in that action, answered therein by substantially admitting the facts set forth in that complaint. The answer of the trustee William P. Earle simply disclaimed any liability on his part and asked for a dismissal of the complaint. The plaintiff

N. Y. Rep.] Opinion of the Court, per WERNER, J.

herein, who was a defendant in the former action, neither appeared nor answered therein. The judgment rendered in that action directed the removal of the trustees and fixed the amounts due to the plaintiff therein and her co-legatees, or their representatives, who had appeared and answered. The rights of the plaintiff in this action were entirely ignored by the judgment in that former action.

It is true, as contended by the appellants, that the plaintiff's rights could have been litigated and adjudged in the former action. But they were not litigated and adjudged therein and this presents the question whether the failure of the plaintiff herein to litigate in the former action what he might there have litigated is conclusive upon him now. The rule is now too well established to be questioned that a judgment is final and conclusive between the same parties or their privies, not only as to the matters actually determined, but as to every other matter which the parties might have litigated and had decided as incident to, or essentially connected with, the subject-matter of the litigation within the purview of the original action, either as matter of claim or defense. (*Patrick v. Shaffer*, 94 N. Y. 423, 430; *Clemens v. Clemens*, 37 id. 59, 73; *Reich v. Cochran*, 151 id. 122.) But the expression "might have been litigated" is one that may be quite misleading when applied to the facts of particular cases. (Freeman on Judgments [4th ed.], sec. 249.) While it is sufficiently broad, in its literal sense, to cover the present case, we do not think its legal meaning goes to that extent. In its practical application to this case it should be limited to such matters as might have been used in the former action as a defense to an adverse claim made by the plaintiff therein, or by one of the plaintiff's co-defendants. When parties are real adversaries upon issues that are or may be litigated, then the adjudication upon such issues as have been litigated is final, and the failure to litigate such as might have been litigated is fatal to further litigation. That this is the sense in which the phrase "might have been litigated" is used by the courts is illustrated by the following cases: In *Malloney v. Horan* (49

N. Y. 111) the plaintiff, a widow, brought an action against the defendant to recover her dower right in certain real estate which had been purchased by the defendant at a receiver's sale. It appeared that in a former action, in which both the plaintiff and her husband were joined as defendants, judgment creditors of the husband sought to set aside a transfer of the same real estate which had previously been conveyed by both the plaintiff and her husband to other parties, and judgment was awarded in that suit in favor of the creditors. The plaintiff had put in an answer in that action, but it did not appear that her dower rights had been adjudicated therein. This court held that the judgment in such former action was not a bar to the action of the widow then before the court. Judge FOLGER, in writing for the court, said: "She (the widow) is bound by that judgment whatever may be its legitimate effect. The judgment is final and conclusive upon her as to all matters put in issue and litigated in the action. (*Clemens v. Clemens*, 37 N. Y. 59.) But as stated above the matter of her inchoate right of dower was not put in issue and litigated therein. It is claimed that the rule goes further, and that the judgment is final and conclusive upon the parties to it upon all matters which might have been litigated and determined therein. It is so asserted. (*LeGuen v. Gouverneur*, 1 Johns. Cas. 436, and note to Shepard's ed.) The plaintiff in this action might have raised in that action the question that she had a right of dower as yet inchoate but which might become complete; and might have asked that if it should be found to exist, the judgment should make provision therefor. (*Vartie v. Underwood*, 18 Barb. 561.) But was she bound to do so? This would not have been matter in direct opposition to the action in defense of the claim made by the plaintiffs therein; it would have been a quasi admission of the cause of action set up, and a seeking for relief in the judgment which must follow. And when the authorities say that a judgment is final and conclusive upon the parties to it, as to all matters which might have been litigated and decided in the action, the expression must be

N. Y. Rep.] Opinion of the Court, per WERNER, J.

limited as applicable to such matters only as might have been used as a defense in that action against an adverse claim therein; such matters as if now considered would involve an inquiry into the merits of the former judgment." (Citing *Whitcomb v. Williams*, 4 Pick. 228, and *King v. Chase*, 15 N. H. 13.)

The plaintiff is unquestionably bound by so much of the judgment in the former action as determined the misconduct of the trustees and directed their removal. But no claim of the plaintiff adverse to facts set up in the complaint therein was passed upon or litigated. He might have had his claim adjusted in that action, but he was not bound to do so. What the plaintiff here claims would not have been a defense to the former action, and, if pleaded and proved, would not have prevented the judgment that was rendered therein, although it could have been embraced in such judgment. The facts of the case, therefore, come directly within the decision of the case of *Malloney v. Horan* (*supra*).

What has been said is emphasized by the relation to each other of the parties in the former action. The defendant trustees there, if they desired the rights of the present plaintiff adjusted in the former action, could easily have obtained that result, and their failure to do so should not work an estoppel against him in this action, for it was the duty of the trustees to point out to the court not only the rights of all parties interested, but their relation to the controversy, and they should not now be permitted to profit by their failure to do so. (Lewin on Trusts [Flint ed.], p. 351.)

In *Bell v. Merrifield* (109 N. Y. 202) the case of *Malloney v. Horan* was cited with approval, and there this court reiterated another rule, which we think is quite applicable to the case at bar: "A valid judgment upon a question directly involved in a suit is conclusive evidence as to that question in any other suit (although for a different cause of action) between the same parties, but it must appear, either by the record in that suit or by extrinsic evidence, that the precise question was raised and determined in the former suit, and

this burden rests, of course, with the party who endeavors to make use of the judgment as conclusive evidence upon that point. If there be uncertainty as to whether or not the question was passed upon, the judgment is not conclusive as evidence."

The recent discussion by this court of the principles governing estoppel by former judgment in *Rudd v. Cornell* (171 N. Y. 114, and cases there cited) render it unnecessary to do more in the present case than to point out the exception which takes it out of the operation of the general rule. It only remains to add that we think the plaintiff's action was not prematurely brought upon his claim to his share of that part of the estate which was set apart for the use of his mother during her life. While this action was commenced in 1884 and the plaintiff's mother did not die until 1894, the former had such an interest in that portion of the estate set apart for the life use of the latter that an action would lie to compel the trustees to account for any misuse of the fund and to make good any loss or waste thereof caused by their neglect.

The judgment appealed from should be affirmed, but without costs, as the present defendants are innocent executors of a deceased trustee.

BARTLETT, J. (dissenting). I am of opinion that William C. Earle, the plaintiff herein, was a necessary party to the action brought by his sister Cornelia.

A part of the relief demanded by Cornelia for herself, "and the other legatees of said testator," was the removal from office of trustees, who under the will were trustees for all the legatees, including William C. Earle, this plaintiff; a general accounting was also asked in that suit.

It appears that after Cornelia's action was begun the plaintiff herein wrote to his uncle, William P. Earle, one of the defaulting trustees, soliciting the loan of money, in which he said, referring to Cornelia's suit: "In regard to that suit, I think you were informed that I was not a party to it, having

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

said from the first that I would not lend my name to it in any manner, and regret very much the unfortunate position you have been placed."

Afterwards the plaintiff herein denied that he had been served in Cornelia's suit, and the question was sent to a referee to ascertain whether such was the fact.

The referee found that the summons and complaint were served upon the plaintiff herein; his report was duly confirmed and the papers relating to this collateral reference were ordered to be made a part of the judgment roll in Cornelia's suit.

The plaintiff herein failed to appear or answer in Cornelia's suit and thus deliberately refused to avail himself of his day in court.

This action was commenced December 19th, 1883, and was not brought to trial until May 16th, 1900, the plaintiff allowing it to sleep for over sixteen years.

The entire subject of the present controversy was embraced in the former action, and the question is not only what was litigated in that action, but what might have been litigated. (*Henderson v. Henderson*, 3 Hare, 100; *Reich v. Cochran*, 151 N. Y. 128; *Jordan v. Van Epps*, 85 N. Y. 427; *Stowell v. Chamberlain*, 60 N. Y. 276; *Patrick v. Shaffer*, 94 N. Y. 430; *Benjamin v. Elmira, J. & C. R. R. Co.*, 49 Barb. 441; *Pray v. Hegeman*, 98 N. Y. 351; *Masten v. Olcott*, 101 N. Y. 157; *Lorillard v. Clyde*, 122 N. Y. 47; *Dows v. McMichael*, 6 Paige, 140.)

In the suit brought by Cornelia this plaintiff and the executors were co-defendants, but they were "adversary parties." (*Freeman on Judgments*, § 158; *Parkhurst v. Berdell*, 110 N. Y. 386.)

There was no occasion, therefore, in Cornelia's action for any defendant to serve his answer on his co-defendants and demand affirmative relief as against them.

I am of opinion that the facts in this case bring the plaintiff herein, as a defendant in Cornelia's action, clearly within the rule established by a long line of cases that the judgment

in the former action is a bar, for the reason that he had abundant opportunity to litigate his rights in that action and refused to do so from motives that are clearly disclosed in this record.

I vote for reversal.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN and VANN, JJ., concur with WERNER, J.; BARTLETT, J., reads dissenting opinion.

Judgment affirmed.

CARL FISCHER-HANSEN, Appellant, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Respondent, Impleaded with Another.

1. ATTORNEY AND CLIENT — CODE CIV. PRO. § 66. Section 66 of the Code of Civil Procedure, relating to an attorney or counsel's compensation, giving a lien upon his client's claim and cause of action from the commencement of the action or special proceeding, and providing a new remedy for its enforcement, is remedial and should be liberally construed.

2. ATTORNEY'S LIEN — ENFORCEMENT AFTER SETTLEMENT BY THE PARTIES BEFORE TRIAL BY EQUITABLE ACTION. Where a claim and cause of action are extinguished by a settlement made by the parties before judgment, the statute impliedly, although not expressly, provides that the attorney's lien shall extend to the proceeds, and it attaches to the fund the instant it is created by the settlement, so that a party who with actual or constructive notice of the lien pays the fund over to the other, does so at his peril, and is liable to the attorney for the amount of his lien in an equitable action to enforce it, where he is unable to collect it from his client on account of his financial irresponsibility. This does not prevent an honest settlement in good faith of his cause of action by the latter, but it does protect the reciprocal right of his attorney to follow the proceeds, and that the legislature intended to protect.

3. CODE REMEDY NOT EXCLUSIVE — WHAT MUST AND MAY BE SHOWN IN SUCH ACTION. The fact that the statute provides a remedy by petition for the enforcement of the lien does not prevent the maintenance of such an action, since that remedy is cumulative and not exclusive; but in such an action the plaintiff must show that he comes within the statute by establishing the facts alleged in his complaint, and it is open to any defense tending to show that no lien ever existed, or that if it once existed it was discharged with the consent of the plaintiff, or was waived, or forfeited by his misconduct or neglect.

Fischer-Hansen v. Bklyn. Heights R. R. Co., 63 App. Div. 356, reversed.

(Argued January 16, 1903; decided February 17, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 20, 1901, affirming a judgment of Special Term sustaining a demurrer to the complaint.

It is alleged in the complaint, in substance, that on the 5th of January, 1900, the plaintiff, an attorney and counselor at law, was retained by the defendant Louis Olsen to commence and prosecute an action against the Brooklyn Heights Railroad Company to recover \$50,000 damages for personal injuries received by said Olsen through the negligence of said company whereby he lost his right leg. A written agreement was entered into between Olsen and the plaintiff, whereby the former agreed that the latter, in consideration of his professional services to be rendered and the disbursements to be made in the said action, should have fifty per cent of the verdict recovered therein. The action was commenced and prompt notice in writing was given to the defendant that the plaintiff claimed a lien upon the papers and subject-matter of the action for his services therein, and requesting it to make no settlement with said Olsen or with any person other than himself. After the defendant had served its answer and the case, duly noticed for trial by both parties, had been placed upon the calendar for trial, the defendant, without notice to the plaintiff herein, settled with the plaintiff therein and agreed to pay him the sum of \$1,500. Upon receiving from him a written release of all claims by reason of said cause of action, it paid him that amount, but no provision was made for the satisfaction of the plaintiff's lien. The settlement was made in secret, and on the next day, Olsen, who was financially irresponsible, returned to Norway, his native country, where he has since remained. The plaintiff alleged that by virtue of these facts he was justly entitled to the sum of \$750, one-half of the amount paid in settlement as aforesaid, but that no part thereof had been paid by either of the defendants, although payment had been duly demanded. His demand for judgment was that his lien in said action as attorney for said Olsen "be ascertained and foreclosed against said defend-

ants and each of them; that this court settle and determine the equities of the parties hereto in relation to plaintiff's said lien in the action hereinbefore referred to;" that by reason of the premises the defendants, or either of them, be adjudged to pay him the amount claimed "based upon" said settlement, and for such other relief "in the premises as shall be just and equitable."

The defendant railroad company demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained both by the Special Term and the Appellate Division, and after the entry of final judgment the plaintiff appealed therefrom to this court.

John R. Dos Passos, Donald F. Ayres and Carl Fischer-Hansen for appellant. Upon the facts and law, plaintiff is entitled to recover. (*N. E. Co. v. Crane*, 167 N. Y. 508; *Peri v. N. Y. C. R. R. Co.*, 152 N. Y. 521; *Pilkington v. B. H. R. R. Co.*, 49 App. Div. 32; *Rockfort v. M. S. Ry. Co.*, 50 App. Div. 261.) The case at bar is clearly within the language of the act of 1879. (*Fenwick v. Mitchell*, 70 N. Y. 670; 1 Kent's Comm. 462; *Antony v. Cardenham*, 2 Bott. 194; *Reg. v. Wyncondham*, L. R. [2 Q. B.] 541; *Reg. v. Colingwood*, L. R. [12 Q. B.] 681; *Reg. v. Dowling*, 8 El. & Bl. 605; *Riggs v. Palmer*, 115 N. Y. 506; *Smith v. People*, 47 N. Y. 330; *People ex rel. v. Lacombe*, 99 N. Y. 49; *People v. Crennan*, 141 N. Y. 239; *People ex rel. T. T. S. R. R. Co. v. Comrs. of Taxes*, 95 N. Y. 558; *O. S. Co. v. Dolloway*, 21 N. Y. 461.) A bill in equity is the proper and regular method of enforcing an attorney's lien. (19 Am. & Eng. Ency. of Law [2d ed.], 35, 36; Pom. Eq. Juris. 1952; *Winslow v. Urquhart*, 39 Wis. 260; *Ogg v. Tate*, 52 Ind. 159; *Ball v. Vason*, 56 Ga. 264; *Watson v. C. B. Co.*, 13 S. C. 433; *Gaskell v. Davis*, 63 Ga. 645; *Lawton v. Case*, 73 Ind. 60; *Cummings v. Halsted*, 26 Minn. 151; *Miller v. Bergenthal*, 50 Wis. 474; *Spink v. McCall*, 52 Iowa, 432; *Phillips v. Gilbert*, 101 U. S. 721.)

N. Y. Rep.] Opinion of the Court, per VANN, J.

Henry Melville and *John L. Wells* for respondent. In order to sustain the complaint, this court must first reverse the uniform decisions of the courts of this state for more than thirty years, which authorize an attorney under these circumstances to prosecute the original action in order to establish his lien, and must then decide that by the settlement with Olsen this respondent conclusively admitted its liability to Olsen in the original action, and conclusively fixed the amount of such liability. (*Pickard v. Yenser*, 21 Hun, 403; *Murphy v. Davis*, 19 App. Div. 615; *O'Brien v. M. S. Ry. Co.*, 27 App. Div. 1; *Quinlan v. Birge*, 43 Hun, 483; *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443; *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521; *Casucci v. A. & K. R. R. Co.*, 65 Hun, 452; *Hart v. City of New York*, 69 Hun, 237; *Randall v. Van Wagenen*, 115 N. Y. 527.)

VANN, J. The law has made great progress in protecting members of the bar since Blackstone wrote that "a counsel can maintain no action for his fees, which are given not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counselor cannot demand without doing wrong to his reputation." (Chase's Blackstone [3rd ed.], 630.) It seems strange to the lawyer of this generation to read the report of a case decided as recently as 1841, in which those eminent lawyers, Samuel Stevens and Peter Cagger, as copartners, had sued their client to recover the sum of \$300 for arguing two cases in the Court of Errors. (*Stevens v. Adams*, 23 Wend. 57; affirmed, *sub nom. Adams v. Stevens*, 26 Wend. 451.) It was gravely argued for the defendant "that at common law a counselor cannot maintain an action for his fees;" that "such is undeniably the law of England, and in this state it has not been held otherwise, the question never having been directly brought up for adjudication." It was held, however, without a dissenting vote either in the Supreme Court or the Court of Errors, that the action would lie, although there was no reported precedent in this state to justify it. Chancellor WALWORTH, writing for the Court

of Errors, declared that he had no doubt "that by the law of this state, as it has always existed from the time of its first settlement, the lawyer, as well as the physician, was entitled to recover a compensation for his services; and that such services were never considered here as gratuitous and honorary merely." Judge COWEN for the Supreme Court said that, as he understood, "there has been a case, perhaps several cases, in this court wherein counsel have been allowed to recover of their clients argument fees in a *quantum meruit*."

Thus within the memory of lawyers now living the right of counsel to recover compensation from their clients, outside of the fee bill, was challenged at the bar and elaborately discussed by the bench, three opinions having been written in the court of last resort to show that the right existed. There has been a marked advance since then, mainly through the legislature, which has been generous to members of the legal profession, not only in costs and allowances, but also in providing a lien upon the subject of the action to secure their compensation.

When the Code of Procedure was enacted in 1848 the fee bill was abolished, all restrictions upon "the right of a party to agree with an attorney, solicitor or counsel, for his compensation" were repealed and the measure of such compensation was thereafter "left to the agreement, express or implied, of the parties." (L. 1848, ch. 379, § 258.)

In 1876, when the first part of the Code of Civil Procedure was passed, the only regulation upon the subject was the following: "The compensation of an attorney or counsellor for his services, is governed by agreement, express or implied, which is not restrained by law." (L. 1876, ch. 448, § 66.)

While this statute was in force a case arose wherein the plaintiff sued a railroad company for damages owing to personal injuries caused by its negligence. He made a written agreement with his attorney to give him one-half of the recovery for prosecuting the action and paying the expenses. After the commencement of the action the defendant, with notice of the facts, settled with the plaintiff by paying him

\$1,000, and it was held by this court that, as the cause of action was not in its nature assignable, the party could not by any agreement before verdict or judgment give his attorney an interest therein and that the settlement was a bar to the action, notwithstanding the agreement that the attorney was to receive a share of the recovery. (*Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443.)

After this decision and doubtless owing to it, said section was amended by adding at the end thereof the following: "From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment." (L. 1879, ch. 542, p. 617, § 66.)

In 1899 the section was further amended by making it apply to a special proceeding, extending the lien to a claim as well as a cause of action and a counterclaim and providing a remedy to determine and enforce the lien upon the petition of either attorney or client, so that the section in its present form, and as it stood when this controversy arose, is as follows: "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien." (L. 1899, ch. 61, p. 80, § 1; Code Civ. Pro. § 66.)

Thus we have a statute gradually progressing in one direction, which has required more than half a century for its development. It consists of only three sentences, but each has been the subject of one or more independent enactments intended to protect attorneys and enable them to collect pay for their services. The first establishes freedom of contract between attorney and client with reference to the compensation of the former. The second and most important gives the attorney a lien upon his client's claim and cause of action, and when the cause of action is merged in a verdict, report, decision or judgment, the lien attaches to that also as well as to the proceeds thereof, so that it cannot be affected by a settlement made between the parties at any stage of the action. The third provides a new remedy.

This act was construed by us in a recent case where the cause of action had become merged in a judgment, and we held that the statute created "a lien in favor of the attorney on his client's cause of action, in whatever form it may assume in the course of the litigation, and enables him to follow the proceeds into the hands of third parties without regard to any settlement before or after judgment;" that all the world must take notice of the lien, and that it was unnecessary for the attorney to give notice of his claim to the other party. (*Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521.)

In discussing the subject we said: "It is urged by the defendant's counsel that this construction of the section is against public policy, as the law favors settlements; that the plaintiff's attorney might refuse to disclose his lien, and thereby stand in the way of settlement and compel parties to litigate who desired to compromise their differences. This criticism overlooks the fact that the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement. The client is still competent to decide whether he will continue the litigation or agree with his adversary in the way."

There is much learning in the books relating to the lien of an attorney upon a judgment for his costs as it existed before

the statute, and though now virtually obsolete, it shows the fixed determination of the courts to protect attorneys against fraudulent settlements. The lien upon a judgment was not created by statute, but was "a device invented by the courts for the protection of attorneys against the knavery of their clients by disabling their clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained." (*Goodrich v. McDonald*, 112 N. Y. 157, 163.)

We now have under consideration a case where a settlement was made before judgment or even a trial, and the defendant claims that the lien of the plaintiff did not attach to the sum which it agreed to pay for a release of the cause of action. Its counsel concedes that the plaintiff might have interposed and prosecuted the action to judgment in his own behalf, notwithstanding the settlement. This form of relief is clumsy and illogical, because it authorizes the trial of a dead lawsuit in the interest of one who never owned the claim upon which it was founded. It was a device of the courts, not of the legislature, and sprang from the necessity of providing some remedy against fraudulent settlements. While it may still be resorted to in such cases, it would be of no value to the plaintiff, because his client immediately after the settlement went beyond the jurisdiction of the courts of this country and has remained absent ever since. Moreover, by bringing this action the plaintiff ratified the settlement and can have no relief except under the statute, which it is now our duty to construe.

The statute is remedial in character, and hence should be construed liberally in aid of the object sought by the legislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action. The common law gave them no lien until the entry of judgment, but the statute gives them one from the commencement of the action. If the claim is prosecuted to judgment, or to a decision upon which judgment may be entered, the lien reaches forward and attaches to that also. When the claim is thus extinguished by

merger in a higher security, the statute makes express provision for the transfer and continuance of the lien. When, however, the claim is extinguished by a settlement, the statute does not expressly provide that the lien shall extend to the proceeds, and the precise question before us is whether, in view of the history and object of the act, this is impliedly commanded. Upon common-law principles the lien on the cause of action follows the proceeds into the hands of the client after payment to him, but as in this case he is irresponsible, it is necessary to determine whether the lien settled upon the fund before the defendant paid it over. Where was the lien during the interval, whether long or short, between the time of coming to terms and the time of payment? The statute says that the lien cannot be affected by any settlement between the parties before or after judgment, but does it mean that no settlement whatever can be made without the consent of the attorney? It clearly means this, unless the lien is impliedly transferred to the proceeds of the settlement. But did the legislature, in its effort to protect attorneys, intend to sacrifice the client by preventing him from making an honest settlement of his own cause of action? Did it intend to overturn the ancient and honored rule of law that settlements are to be encouraged, by giving the attorney power to insist that the litigation must continue until he consents that it should stop? Did it intend to so tie the hands of the client that he could not settle his own controversy without the permission of his attorney? A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it. As it is merely incidental and for the purpose of security only, it would not be reasonable to hold that the legislature intended it should be the means of blocking an honest and genuine adjustment of controversies. We think the lien is subject to the right of the client to settle in good faith, without regard to the wish of the attorney, and we so held in the *Peri* case, where we declared that "the existence of the lien does not permit the plaintiff's attorney to stand in the

way of a settlement." The right of the parties to thus settle is absolute and the settlement determines the cause of action and liquidates the claim. This necessarily involves the reciprocal right of the attorney to follow the proceeds of the settlement, and if they have been paid over to the client, to insist that his share be ascertained and paid to him, for the defendant is estopped from saying that with notice of the lien he parted with the entire fund.

Of course, we do not refer to dishonest settlements made to cheat attorneys, which the courts will brush aside with a strong hand, but to honest settlements, made in good faith because the client preferred something certain in hand to the uncertainty of protracted litigation. Such settlements are not prohibited by the existence of the attorney's lien. The legislature did not intend to make the lien the chief thing, nor to compel the client to abdicate his position as principal in favor of the agent or attorney whom he employed in order to secure his rights. It did not intend to prevent him from dealing with his own property as he saw fit, provided he exercised his honest judgment and took no advantage of his attorney. In this case the plaintiff, by standing on the settlement, admits that it was made in good faith and thus confirms his lien upon the proceeds, which was not defeated by payment to his client, for the defendant paid at its peril. It had both actual and constructive notice of the lien, and while it does not appear that it knew the share of the fund that the plaintiff was entitled to receive, its duty was to ascertain the amount and retain it for him.

Moreover, the general rule is that a lien upon property attaches to whatever the property is converted into and is not destroyed by changing the nature of the subject. Thus a lien upon timber ordinarily extends to the shingles made out of it; a lien upon domestic animals to their young subsequently born, and a lien upon a mortgage to the land into which the mortgage is converted by foreclosure. It follows its subject and cannot be shaken off by a change of form or substance. It clings to any property or money into which the

subject can be traced, until it reaches the hands of a *bona fide* purchaser. So a lien upon a claim or a cause of action follows the fund created by a settlement of the claim, which thereupon ceases to exist. It attaches to the amount agreed upon in settlement the instant that the agreement is made, and if the defendant pays over to the client without providing for the lien of the attorney, he violates the rights of the latter and must stand the consequences. We think that the plaintiff had a lien upon the sum which the defendant agreed to pay to extinguish the cause of action, and that the law will not permit it to say that it has nothing in its hands to satisfy it. The lien was not affected by the adjustment, but leaped from the extinguished cause of action to the amount agreed upon in settlement.

The remedy provided by the Code by means of a petition is not exclusive, but cumulative, for a court of equity has always had power to ascertain and enforce liens. We have endeavored to establish that the plaintiff's lien was transferred from the cause of action to the fund into which the claim was converted by the action of the parties, and hence within familiar principles a court of equity has power to enforce that lien in an action brought for that purpose. Actions to establish and enforce liens are among those most familiar to equity jurisprudence. Even if the relief ultimately granted is in the form of a money judgment, still that will be possible only through the exercise of equitable jurisdiction in ascertaining the lien and determining its amount. A money judgment may then follow, as a foreclosure is unnecessary when the subject of the lien has already been converted into money. (*Baily v. Hornthal*, 154 N. Y. 648, 661; *Mooney v. Byrne*, 163 N. Y. 87, 96.) While the statute gives the lien, the plaintiff must show that he comes within the statute by establishing the facts alleged in his complaint, and the action is open to any defense tending to show that no lien ever existed, or that if it once existed it was discharged with the consent of the plaintiff, or was waived or forfeited by his misconduct or neglect.

N. Y. Rep.]

Statement of case.

The judgment should be reversed, the demurrer overruled and judgment rendered for the plaintiff, with costs in all courts.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN and WERNER, JJ., concur.

Judgment reversed, etc.

MARTHA H. STARBUCK, Respondent, v. MATILDA E. STARBUCK et al., Appellants, Impleaded with Others.

HUSBAND AND WIFE — EVIDENCE — DECREE OF DIVORCE OBTAINED BY WIFE IN ANOTHER STATE, UPON GROUNDS NOT RECOGNIZED IN THIS STATE, COMPETENT EVIDENCE AGAINST HER IN ACTION FOR DOWER IN HUSBAND'S PROPERTY ACQUIRED SUBSEQUENT TO DIVORCE. In an action of dower brought by one claiming to be the widow of decedent an exemplified copy of a decree of divorce, obtained by the plaintiff in Massachusetts upon the ground of extreme cruelty, in an action in which decedent was personally served with the summons, but did not, either personally or by attorney, appear therein, or submit himself to the jurisdiction of the Massachusetts court, is competent evidence tending to defeat her claim that she is the widow of the decedent and entitled to dower in the real estate acquired by him after the decree; since the plaintiff cannot be heard to impeach a decree or judgment which she, herself, has procured to be entered in her own favor.

Starbuck v. Starbuck, 62 App. Div. 487, reversed.

(Argued January 29, 1903; decided February 17, 1903.)

APPEAL from a judgment entered January 4, 1902, upon an order of the Appellate Division of the Supreme Court in the second judicial department, overruling defendant's exceptions to an interlocutory judgment, and denying a motion for a new trial made under section 1001 of the Code of Civil Procedure.

Artemas H. Holmes for Matilda E. Starbuck appellant. The decisions of the court below were erroneous. (*Matter of Swales*, 172 N. Y. 651; 60 App. Div. 599.) The Massachusetts decree was well pleaded and properly proved. (*Krekeler v. Ritter*, 62 N. Y. 372; *Church v. Kidd*, 88 N. Y. 654; *Matter of Huss*, 126 N. Y. 537; *Atlanta, etc., v.*

Andrews, 120 N. Y. 58; *Dunstan v. Wiggins*, 138 N. Y. 70; *Lloyd v. Matthews*, 155 U. S. 222; U. S. R. S. § 905; Code Civ. Pro. §§ 532, 952.) Plaintiff, having invoked and submitted herself to the jurisdiction of the Massachusetts court, cannot be heard to question that court's jurisdiction or the validity of its decree as affecting her marital status until it is reversed, except on the ground of fraud. (*Matter of Morrison*, 52 Hun, 102; *Hilton v. Guyot*, 159 U. S. 113; *Shaw v. Shaw*, 98 Mass. 158; *Hood v. Hood*, 110 Mass. 463; *Burlen v. Shannay*, 115 Mass. 423; *Blackington v. Shannay*, 141 Mass. 435; *Huntington v. Attrill*, 146 U. S. 657.)

William N. Dykman for William H. Starbuck et al., appellants. The decree of divorce was valid, material and relevant because the status of the plaintiff in Massachusetts is in question and the decree fixes that. (*Oscanyan v. Arms Co.*, 103 U. S. 261; *Clews v. N. Y. N. B. A.*, 105 N. Y. 398; *Flynn v. B. C. R. Co.*, 158 N. Y. 493; *Roblee v. Indian Lake*, 11 App. Div. 435.) The Massachusetts decree changes the marital status of the plaintiff. (*Rigney v. Rigney*, 127 N. Y. 408; *Cross v. Cross*, 108 N. Y. 628; *DeMeli v. DeMeli*, 120 N. Y. 485; *Williams v. Williams*, 130 N. Y. 199; *O'Dea v. O'Dea*, 101 N. Y. 23; *Matter of Kimball*, 155 N. Y. 62; *Matter of Hall*, 61 App. Div. 266; *Van Voorhis v. Brintall*, 86 N. Y. 18; *Haviland v. Haviland*, 34 N. Y. 643; *Winston v. Winston*, 165 N. Y. 553.) In New York the decree dissolving the marriage cut off the capacity of the plaintiff to become endowed in lands thereafter acquired by Mr. Starbuck. (*Kade v. Lauber*, 16 Abb. Pr. [N. S.] 288; *Barrett v. Failing*, 111 U. S. 523; *Matter of Ensign*, 103 N. Y. 284; *Van Cleef v. Burns*, 118 N. Y. 549.) The statutes of New York did not save the plaintiff's dowable capacity from the effect of the decree. (*Wait v. Wait*, 4 N. Y. 95.) The Massachusetts decree must in New York be held to have dissolved the marriage and to have established Mr. Starbuck's status as an unmarried man. (*Atherton v. Atherton*, 181 U. S. 155; *Hawkins v. Ragsdale*,

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

80 Ky. 353; *Hurdling v. Alden*, 9 Greenl. 140; *Ditson v. Ditson*, 4 R. I. 87.) The respondent is estopped to deny the validity of the Massachusetts decree which she obtained. (*Matter of Morrison*, 52 Hun, 102; 117 N. Y. 638; *Matter of Swales*, 60 App. Div. 599; *Zollner v. Zollner*, 46 Mich. 511; Nelson on Div. & Sep. §§ 556, 1053; *Lowd v. Lowd*, 129 Mass. 14; *Garner v. Garner*, 38 Ind. 139; *Manlove v. State*, 149 Ind. 80; *Marvin v. Foster*, 61 Minn. 154; *Ellis v. White*, 61 Iowa, 644; *Rundle v. Van Inwagen*, 9 Civ. Pro. Rep. 328; *Todd v. Kerr*, 42 Barb. 317.)

Robert D. Benedict and *James Emerson Carpenter* for respondent. The Massachusetts decree was of no effect outside of Massachusetts. Its effect must be confined to the jurisdiction in which it was entered and cannot be pushed beyond the boundaries of Massachusetts into the state of New York. In New York it never had or could have any power or effect whatever. (*McGown v. McGown*, 9 App. Div. 368; *Williams v. Williams*, 130 N. Y. 199; *Hamilton v. Hamilton*, 26 Misc. Rep. 336; *Winston v. Winston*, 165 N. Y. 550; *O'Dea v. O'Dea*, 101 N. Y. 23; *De Meli v. De Meli*, 120 N. Y. 485; *Cross v. Cross*, 108 N. Y. 628.) There is no question of estoppel in the case. (*People v. Chase*, 28 Hun, 256; *Meyenborg v. Haynes*, 50 N. Y. 675.)

HAIGHT, J. This action was brought by the plaintiff as the widow of William H. Starbuck, deceased, to recover dower in the real estate of which he died seized.

The decedent and the plaintiff were married in the commonwealth of Massachusetts on the 14th day of October, 1857, he being a resident of this state where he continued to reside until his death, which occurred on the 29th day of March, 1896. In the year 1868 the plaintiff left her husband's residence and returned to her parents' home in Massachusetts, taking her daughter with her, where she resided until after his death. She then removed to this state and brought this action. Upon the trial the defendants offered in

evidence an exemplified record of a decree of divorce obtained by the plaintiff from her husband in the state of Massachusetts on the 4th day of May, 1874, upon the ground of extreme cruelty. The papers in that action were served upon the decedent personally in this state, but he did not appear in the action either personally or by attorney and did not submit himself to the jurisdiction of the Massachusetts court. This decree was excluded from evidence upon the objection of the plaintiff's attorney, and exceptions were taken to such exclusion by the defendants. After the divorce Starbuck contracted a marriage with the defendant Matilda Eliza Starbuck in the state of Pennsylvania, and the minor defendants are children of that union. The real estate in which the plaintiff seeks to recover dower is all situated in this state, and was acquired by Starbuck after the divorce.

We are of the opinion that the Massachusetts decree was competent and that the defendants had the right to have it received in evidence. True, the plaintiff could not avail herself of a void decree, which she had procured to be entered, any more than she could of her own declarations, but it is different with the defendants. [They have the right to avail themselves of the declarations, acts and decrees obtained by their opponent, and the principle is well established that, where a party has procured a judgment or decree to be entered, submitting himself to the jurisdiction of the court, he cannot thereafter be heard to question the jurisdiction of the court which entered the judgment or decree.] The decree, therefore, if it had been received in evidence, would have operated to defeat her claim that she is now the widow of the decedent and entitled to dower in the real estate acquired by him after the decree. We have recently had under consideration a similar question in *Matter of Swales* (60 App. Div. 599), affirmed upon the opinion of the Appellate Division (172 N. Y. 651). In that case Mary E. Swales petitioned the Surrogate's Court for letters of administration upon the estate of William H. Swales, deceased, claiming to be his widow. It appeared that they were married on the 3d day of May, 1869,

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

at Sodus, in this state, and that in December, 1873, they separated; that in the year 1883 the petitioner obtained a decree of divorce from him in the state of Illinois, which purported to dissolve the marriage between the parties upon grounds which are not recognized by the laws of this state as sufficient for that purpose. The summons or process by which the action was commenced was served by publication only, and the decedent did not appear in the action either in person or by counsel. After obtaining the divorce, the petitioner married one David Trobridge, with whom she has since cohabited and resided in this state, and by whom she has a daughter. After the death of Swales she petitioned for letters of administration, as we have seen, claiming to be his widow. In that case ADAMS, P. J., in delivering the opinion of the court, says: "We think the case justifies the application of a * * * principle which is, that where a party has invoked the jurisdiction of any court and submitted himself thereto, he cannot thereafter be heard to question such jurisdiction."

In *Matter of Morrisson*, (52 Hun, 102), the decedent's personal estate was claimed by the legal representatives of her deceased husband, Henry Feyh. He had previously obtained a divorce from her in the state of Ohio while she was domiciled in this state. It was claimed on behalf of the personal representatives of Henry Feyh that the decree of the Ohio court was void in this state. It was held that they were not entitled to the estate. VAN BUREN, P. J., in delivering the opinion of the court, said: "Henry Feyh, having invoked the jurisdiction of the court of Ohio and submitted himself thereto, cannot now be heard to question such jurisdiction. And the claimants here occupy precisely the same position that Feyh would have occupied had he been living. This position does not rest upon the doctrine of estoppel, as such term is ordinarily used, but upon a principle which has been repeatedly recognized by the courts, that where a party has gone into a court and invoked its jurisdiction he cannot subsequently attack the decree of the court obtained at his

instance because of the want of jurisdiction of somebody else." This decision was affirmed in this court (117 N. Y. 638). (See, also, *Kinnier v. Kinnier*, 45 N. Y. 535; *Coddington v. Coddington*, 10 Abb. Pr. 450; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Hunter v. Hunter*, 111 Cal. 261; *Hewitt v. Northrup*, 75 N. Y. 506; *Matter of Ellis' Estate*, 55 Minn. 401; *Ellis v. White*, 61 Ia. 644, and *Van Koughnet v. Dennie*, 68 Hun, 179.)

There are a number of cases in which the courts of this state have refused to recognize the validity of divorces obtained in other states upon grounds insufficient for that purpose in this state when the defendant resided here and was not personally served with process and did not appear in the action. (*Matter of Kimball*, 155 N. Y. 62; *Williams v. Williams*, 130 N. Y. 193; *de Meli v. de Meli*, 120 N. Y. 485; *Cross v. Cross*, 108 N. Y. 628; *O'Dea v. O'Dea*, 101 N. Y. 23.) But in none of these cases did the party procuring the decree seek a benefit by having it held invalid. [A party cannot avail himself of a defense or of a right to recover by means of an invalid decree or judgment obtained by him; but, on the other hand, he may not be heard to impeach a decree or judgment which he himself has procured to be entered in his own favor.]

We think the case under consideration cannot be distinguished from that of *Swales* or *Morrisson*. It is true that in the *Swales* case the petitioner was seeking administration instead of dower, but if she was the widow of the decedent she had a statutory right to administer the estate, and the plaintiff in her action for dower has no greater right. In the *Swales* case the petitioner after procuring her decree of divorce had remarried. In this case the plaintiff procured her divorce, but did not remarry; but it does not appear to us that this distinction affects the legal proposition involved.

It is said in the *Swales* case that the action of the plaintiff in procuring the decree of divorce in Illinois does not constitute an estoppel within the ordinary acceptance of that term; for the reason that it did not influence the decedent to do any-

N. Y. Rep.]

Statement of case.

thing which he would not otherwise have done. That may be true in that case; and yet in other cases the decree may influence parties to do that which they otherwise would not have done. The statute of the state of Massachusetts, upon certain conditions, permits both parties to marry again. If Starbuck had gone to that state and had contracted a marriage with a woman there, who acted upon the faith of the decree that the plaintiff had obtained, it may be that a question of estoppel would have been presented. (*Moore v. Hegeman*, 92 N. Y. 521.) But we do not deem it necessary to determine that question at this time. We prefer to rest our decision upon the principle that the plaintiff, having invoked the jurisdiction of the Massachusetts court and submitted herself thereto, cannot now be heard to question the validity of its decree.

The judgment of the Appellate Division and that of the trial court should be reversed and the plaintiff's complaint dismissed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, CULLEN and WERNER, JJ., concur; O'BRIEN, J., absent.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
LUIGI FILIPPELLI, Appellant.

1. MURDER — SUFFICIENCY OF EVIDENCE. The evidence upon a trial for homicide reviewed and held sufficient to support a verdict convicting the defendant of the crime of murder in the first degree.

2. SAME — POWER OF COURT OF APPEALS TO REVERSE JUDGMENT ENTERED UPON VERDICT OF JURY — CODE CR. PRO. § 528. Under the statute (Code Cr. Pro. § 528) the Court of Appeals has no power to reverse the judgment of death entered upon such verdict where it does not appear that error was committed or that justice requires a new trial.

3. HOMICIDE COMMITTED BY PERSON ENGAGED IN QUARREL WITH ANOTHER — WHEN IT CONSTITUTES MURDER — WHEN MANSLAUGHTER. Where one takes life though in defense of his own life in a quarrel which he himself has commenced with the intent to take life or inflict grievous bodily harm, the jeopardy in which he has been placed by the act of his antagonist constitutes no defense whatever, but he is guilty of murder;

if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his act, but his offense is reduced from murder to manslaughter.

4. CHARGE TO JURY — REVIEWED AND HELD NOT ERRONEOUS. Where the court in a murder trial, at the request of the prosecution, charged: "To establish the defense of justifiable homicide it is the duty of one engaged in a quarrel to avoid an attack and not become the aggressor unless other means are unavailable, and if you find that the defendant in this case having, on the afternoon of the 22d of October, been engaged in a quarrel with the deceased, and desiring to continue that quarrel, descended from the house of Bernardino Marotta to the street, and knew that the deceased was in the street, and with the intention of continuing that quarrel, and for the purpose of making his quarrel effective, took with him a dangerous weapon, and if under those circumstances the defendant sought out the deceased in the public street and entered upon the quarrel which had been interrupted, even though the deceased, under such circumstances, merely drew a revolver, the defendant may be regarded as the assailant and the wrongdoer, and his action in stabbing the deceased is not justifiable homicide," such charge is not erroneous, although it is not entirely plain what is the meaning of the expression "and for the purpose of making the quarrel effective;" since, assuming it to mean that defendant took the weapon with the purpose of taking the life of the deceased or inflicting upon him grievous bodily harm the charge was proper, but assuming it to mean, on the other hand, that if the jury should find that the defendant renewed the quarrel whether with or without intent to take life or inflict grievous bodily harm, the killing of the deceased was not justifiable homicide, it was nevertheless correct, since the absence of intent to take life or work grievous bodily injury would not make the subsequent act of the defendant justifiable homicide, but only reduce his offense to manslaughter.

(Argued January 23, 1903; decided February 17, 1903.)

APPEAL from a judgment of the Court of General Sessions of the county of New York, rendered February 21, 1901, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

Nathaniel Cohen for appellant. The verdict was against the evidence, and justice demands a new trial. (Code Crim. Pro. § 528; *People v. Kennedy*, 164 N. Y. 458.) The trial justice committed grave and prejudicial error in his charge to

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

the jury. (Penal Code, § 205; *Wallace v. United States*, 162 U. S. 471; *Gourko v. U. S.*, 153 U. S. 183; *Foutch v. State*, 95 Tenn. 716; *Daniel v. State*, 10 Lea, 261; *Fitzgerald v. State*, 1 Leg. Rep. 53; *Aldridge v. State*, 59 Miss. 250; *Cartwright v. State*, 14 Tex. App. 486; *Hash v. Commonwealth*, 88 Va. 172; *State v. Patterson*, 159 Mo. 561; *State v. Rapp*, 142 Mo. 443.)

William Travers Jerome, District Attorney (Howard S. Gans of counsel), for respondent. The charge made the finding of an intent to use a deadly weapon in a quarrel of his own seeking the requisite to a finding that the defendant was the aggressor, and it was, therefore, a correct statement of the law. (*People v. Constantino*, 153 N. Y. 24; *Anderson v. United States*, 170 U. S. 508; *Wallace v. United States*, 162 U. S. 471; *People v. McGrath*, 47 Hun, 395; *People v. Truck*, 170 N. Y. 203.)

CULLEN, J. The appellant was convicted of murder in the first degree in having killed one Michael Carrafiello on October 22d, 1900, by stabbing him in the bowels with a knife. The facts of the case lie within a comparatively narrow compass. The deceased and the witness Decicco, on the day of the homicide, went from Bridgeport, Connecticut, where they were then residing, to the city of New York, and about two o'clock in the afternoon reached the apartment of an acquaintance, Bernardo Marotta, in First avenue near One Hundred and Fifteenth street. There they found Marotta, his wife and the appellant. While in this apartment the parties had some beer, and after a time Mrs. Marotta demanded from the deceased payment of some money which the latter owed to her. The deceased stated either that he was unable or unwilling to pay his debt. Some words ensued between them, when the defendant intervened in the dispute. There is a conflict in the evidence as to what thereupon took place. The defendant and Marotta and his wife testified that the deceased drew a revolver and threatened to shoot the defendant. Decicco,

the companion of the deceased, testified that the defendant drew a revolver, and that the deceased had none. However this may be, it appears that no blows were struck, nor weapons used, and that Marotta took the defendant away and shut him up in an adjoining room. After a short while the deceased, Decicco and Marotta went together down into the street and remained for some time on the sidewalk. Here again witnesses disagree as to what took place. Marotta and his wife and their son, a boy about eleven years old, say that the deceased drew his revolver and threatened the defendant, who appeared at the window of the room above, and also sent by the boy a challenge to the defendant to come to the street, when he (the deceased) would "fix him like Christ on the cross." Decicco denied any occurrence of this character, and testified that the defendant brandished a revolver from the window. While standing on the sidewalk one De Feo joined the party, and the deceased and Decicco went with him to his apartments in One Hundred and Fifteenth street, where they met Angelo Testa. There they played cards and drank beer. Between seven and eight o'clock in the evening all these persons went out of the house and stood on the sidewalk at the corner of One Hundred and Fifteenth street and First avenue, listening to music given at a political meeting in that vicinity. While there Marotta passed by on his way to a saloon to get beer. The deceased stepped away from his companions and spoke to Marotta and at this time the defendant approached him and inflicted the fatal wound. The occurrence was of the briefest duration, but as to its details there is the sharpest conflict between the witnesses. The three companions of the deceased, Decicco, Testa and De Feo, testified that the defendant approached the deceased and stabbed him in the abdomen without warning or altercation. The defendant and Marotta testified that the deceased seized the defendant by the coat and drew a revolver, and that thereupon the defendant struck him with the knife. The defendant testified that he was afraid of the deceased, and that when he saw the latter he opened his knife and put it

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

opened into his pocket. After striking the blow the defendant ran away through the hallway and up the stairs of an adjacent house, to the roof, where he was apprehended by a police officer who there found the knife which the defendant had thrown away. No revolver was found on the deceased and his companions testified that he had none. The defendant was brought into the presence of the deceased, who identified him as the man who had inflicted the wound. The deceased died the following day.

From this summary of the evidence it will be seen that the case presented a clear and well-defined question of fact to be determined by the jury and that question has been resolved against the defendant. If the testimony of the companions of the deceased was believed, that the defendant stabbed the deceased without altercation or anything occurring at the time to excite passion or anger, it cannot be denied that the jury could justly infer the premeditation and deliberation necessary to constitute murder in the first degree under our statute. [*Leighton v. People*, 88 N. Y. 117; *People v. Majone*, 91 N. Y. 211; *People v. Conroy*, 97 N. Y. 62.) In the *Conroy* case it is said: "If a person is undisturbed by sudden and uncontrollable emotions, excited by an unexpected and observable cause, and is in the possession of his usual faculties, it will be presumed that his actions are prompted by reason and are the result of causes operating upon his mind and deemed sufficient by him to inspire his action. A sane person, meeting a stranger upon the street, and in the absence of a sudden impulse produced by an observable cause, without words of explanation or warning, immediately drawing a deadly weapon and therewith causing death unquestionably brings himself within the penalties prescribed for the punishment of the crime of murder in the first degree." It is true that if the testimony of the defendant himself and of Marotta was credited the affray bore an entirely different aspect and the jury might have found that the homicide was either justifiable or constituted manslaughter only. But the question of which set of witnesses told the truth, those for the People

or those for the defendant, was pre-eminently one for the jury. [The jurors saw the witnesses and heard them testify, and from their appearance, demeanor and manner of testifying, was in no small measure to be determined the credibility which should properly be accorded them. In such a case the finding of a jury should not be set aside unless we see that error has been committed or injustice done. Section 528 of the Code of Criminal Procedure provides: "When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below." But it is the settled law "that in determining whether a new trial shall be granted under it, it is not the province of this court to review or determine controverted questions of fact arising upon conflicting evidence, but that the jury is the ultimate tribunal in such a case, and that with its decision the court may not interfere unless it reaches the conclusion that justice has not been done." (*People v. Decker*, 157 N. Y. 186.) It is further to be observed that there are several circumstances which tend to largely discredit the defendant's version of the affray. No pistol was found on the deceased. It is singular that if the deceased drew a pistol in Marotta's apartment, Marotta should have removed the defendant from the apartment and shut him up in another room and have accompanied the deceased to the street, and remained there apparently in amicable intercourse with him. The defendant admits that before he reached the deceased he opened his knife and had it opened in his pocket. The fact that the weapon used by the defendant was only a pocket knife was doubtless a circumstance to be considered in his favor, but opening it in advance of the affray militates against him. In the light of the evidence we cannot say that the verdict of the jury was wrong or that justice requires that a new trial shall be granted.

It is contended that the trial court erred in its instructions to the jury. At the request of the prosecution the court

charged: "To establish the defense of justifiable homicide it is the duty of one engaged in a quarrel to avoid an attack and not become the aggressor unless other means are unavailable, and if you find that the defendant in this case having, on the afternoon of the 22nd of October, been engaged in a quarrel with the deceased, and desiring to continue that quarrel, descended from the house of Bernardino Marotta to the street, and knew that the deceased was in the street, and with the intention of continuing that quarrel, and for the purpose of making his quarrel effective, took with him a dangerous weapon, and if under those circumstances the defendant sought out the deceased in the public street and entered upon the quarrel which had been interrupted, even though the deceased, under such circumstances, merely drew a revolver, the defendant may be regarded as the assailant and the wrongdoer, and his action in stabbing the deceased is not justifiable homicide," to which the defendant duly excepted. It is urged that the charge was erroneous, in that it ignored the consideration that to deprive a person who commences a quarrel of the right to self-defense the quarrel must be brought on or the assault committed with a felonious intent either to kill or inflict grievous bodily harm on his antagonist. What are the rights and what are the responsibilities of the original aggressor who takes life in a quarrel have been the subject of much discussion by the text writers and in judicial opinions. The strict rule has been stated in England that "No man shall justify the killing of another by pretense of necessity unless he were himself without fault in bringing that necessity upon himself." (1 Hawkins P. C. 82, 83; see, also, 1 East P. C. 278.) This extreme doctrine has not been accepted in the later cases in this country. It has been held that if the defendant withdraw from the quarrel which he has provoked and this is made known to his antagonist and after such withdrawal his antagonist assails him with intent to take his life or inflict grievous bodily harm, he may lawfully defend himself. (*Stoffer v. State*, 15 Ohio St. 47.) The doctrine has been further limited even where the

original aggressor has not entirely withdrawn from the quarrel, but the quarrel was commenced with no intention to either take the life of the opposite party or inflict upon him grievous bodily harm. (*Wallace v. U. S.*, 162 U. S. 466; see *Adams v. People*, 47 Ill. 376; *Reed v. State*, 11 Tex. App. 509.) In the *Wallace* case it is said: "Where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defense; but where the accused embarks in a quarrel with no felonious intent, or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger he inflicts a fatal wound, it is not murder." But this must not be construed as implying the proposition that under the circumstances last stated the killing would be justifiable homicide. In the case then before the court the prisoner had been convicted of murder and the question under review was the exclusion of certain testimony which it was claimed tended to reduce the crime from murder to manslaughter, and the statement quoted was made with reference to that question. This appears from the fact that the Illinois case and the Texas case cited are quoted with approval. The doctrine of these cases is very plain. In the Illinois case the court said: "That where the accused sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him, in pursuance of his malicious intention, he would be guilty of murder; but that if the jury found that the accused voluntarily got into the difficulty or fight with the deceased, not intending to kill at the time, but not declining further fighting before the mortal blow was struck, and finally drew his knife and with it killed the deceased, the accused would be guilty of manslaughter although the cutting and killing were done in order to prevent an assault upon him by the deceased or to prevent the deceased from getting the advantage of him in the fight." In the Texas case the court said of self-defense: "It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail

N. Y. Rep.]

Opinion of the Court, per CULLEN, J.

where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong — if he was himself violating or in the act of violating the law — and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of offense which but for such acts would never have been occasioned. * * * If he was engaged in the commission of a felony and, to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law.” The doctrine of these cases seems to us entirely just and to be as favorable to a defendant as can be upheld consistently with proper protection of human life. Tersely stated it is that if one takes life though in defense of his own life in a quarrel which he himself has commenced with the intent to take life or inflict grievous bodily harm, the jeopardy in which he has been placed by the act of his antagonist constitutes no defense whatever, but he is guilty of murder. But if he commenced the quarrel with no intent to take life or inflict grievous bodily

harm, then he is not acquitted of all responsibility for the affray which arose from his act, but his offense is reduced from murder to manslaughter.

Tested by this rule the charge of the trial court was not erroneous. Some parts of it are subject to criticism as being indefinite. The first proposition, that "to establish the offense of justifiable homicide, it is the duty of one engaged in a quarrel to avoid an attack and not become the aggressor, unless other means are unavailable," stated unquestionably the correct rule of law. (*People v. Sullivan*, 7 N. Y. 396.) In the second proposition, "and if you find that the defendant in this case * * * with the intention of continuing that quarrel, *and for the purpose of making his quarrel effective*, took with him a dangerous weapon, and if, under those circumstances, the defendant sought out the deceased in the public street and entered upon the quarrel which had been interrupted, even though the deceased, under such circumstances, merely drew a revolver, the defendant may be regarded as the assailant and the wrongdoer and his action in stabbing the deceased is not justifiable homicide," there is a lack of clearness. It is not entirely plain what is the meaning of the expression "and for the purpose of making his quarrel effective." If this is to be understood as meaning with the purpose of taking the life of the deceased or inflicting upon him grievous bodily harm, then, concededly, the charge was proper. I am not sure that, taken in connection with the qualification stated by the court, that the jury should find that the deceased took with him a dangerous weapon, such is not the fair meaning of the charge. But assuming that the charge is capable of the interpretation that if the jury should find that the defendant renewed the quarrel, whether with or without intent to take life or inflict grievous bodily harm, the killing of the deceased was not justifiable homicide, it was nevertheless correct, for, under the doctrine of the cases cited, the absence of intent to take life or work grievous bodily injury would not make the subsequent act of the defendant justifiable homicide but only reduce his offense to manslaughter. As to this

N. Y. Rep.]

Statement of case.

grade of crime the instructions of the trial court were full and fair.

The judgment should be affirmed.

VANN, J. I dissent upon the ground that there was no evidence authorizing the jury to find that the defendant "took with him a dangerous weapon," because the knife used was but a penknife that he had carried in his vest pocket for months. The expression quoted was an essential element of the proposition charged and the exception thereto requires a reversal.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and WERNER, JJ., concur with CULLEN, J.; VANN, J., reads dissenting memorandum.

Judgment of conviction affirmed.

JAMES M. PINDER, as Administrator of the Estate of ARTHUR PINDER, Deceased, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

NEGLIGENCE—WHEN STREET RAILWAY COMPANY NOT LIABLE FOR DEATH OF PERSON KICKED OR THROWN FROM CAR BY MOTORMAN AND STRUCK BY ANOTHER CAR WHILE CROSSING THE TRACKS. Where a bright boy about fourteen years of age, with no physical defect that affected his strength or activity, who was riding upon the front platform of an electric car, was thrown or kicked from the car by the motorman, and, picking himself up slowly, walked lamely back a short distance and proceeded to cross over the tracks and while in the act of crossing the second or further track was struck by a car running at a high rate of speed and received such injuries that he subsequently died therefrom, the railway company is not liable for his death, where it appears that the place where he was injured was well lighted by electric lights and that the car, itself, well lighted up, was about 125 feet distant at the time he attempted to cross the tracks, and there was no evidence proving, or tending to prove, that he either looked or listened for the approach of a car before crossing the second track, or evidence that would justify the inference that he was so injured by being thrown from the car on which he had been riding that he was unable to use his powers of sight and hearing or to judge of the peril of the situation.

Pinder v. Bklyn. Heights R. R. Co., 65 App. Div. 521, reversed.

(Argued January 30, 1903; decided February 17, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 29, 1901, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

I. R. Oeland and *George D. Yeomans* for appellant. There being no evidence to show decedent's freedom from contributory negligence, and no circumstances from which a reasonable inference could be drawn by the jury that he was free from contributory negligence, the trial court did not err in dismissing the complaint. (*Wieland v. D. & H. C. Co.*, 167 N. Y. 27; *Wiwirowski v. L. S. & M. S. R. R. Co.*, 124 N. Y. 420; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 N. Y. 330; *Tolman v. S., B. & N. Y. R. R. Co.*, 98 N. Y. 198; *Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 N. Y. 527; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 248; *Bond v. Smith*, 113 N. Y. 378; *Ruppert v. B. H. R. R. Co.*, 154 N. Y. 94; *Baulec v. N. Y. C. & H. R. R. R. Co.*, 59 N. Y. 357.) There was no proof of defendant's negligence or facts from which a reasonable inference could be drawn that the defendant was negligent, and the trial court did not err in dismissing the complaint. (*McDonald v. M. S. Ry. Co.*, 167 N. Y. 67; *Keller v. Brooklyn H. R. R. Co.*, 48 App. Div. 557; *Totarella v. N. Y. & Q. C. R. Co.*, 53 App. Div. 413; *Costello v. T. A. R. R. Co.*, 161 N. Y. 317.) The Appellate Division erred in reversing the judgment of the trial court. (*Ruppert v. B. H. R. R. Co.*, 154 N. Y. 94; 171 N. Y. 633; *Seifter v. B. H. R. R. Co.*, 169 N. Y. 254; *People v. Kennedy*, 32 N. Y. 140; *People v. Fitzsimmons*, 156 N. Y. 257; *Getman v. D. & L. R. R. Co.*, 162 N. Y. 25.)

Robert Stewart for respondent. The question of contributory negligence was, under all the circumstances of the case, one of fact for the jury to determine, and should have

N. Y. Rep.]

Opinion of the Court, per GRAY, J.

been submitted to them. (*Place v. N. Y. C. R. R. Co.*, 167 N. Y. 345; *Costello v. T. A. R. R. Co.*, 161 N. Y. 317; *Higgins v. Eagleton*, 155 N. Y. 471; *Stuber v. McEntee*, 142 N. Y. 205; *St. John v. N. Y. C. R. R. Co.*, 165 N. Y. 241; *McDonald v. M. S. Ry. Co.*, 167 N. Y. 66; *Totarella v. N. Y. & Q. C. R. Co.*, 53 App. Div. 413; *Palmer v. Dearing*, 93 N. Y. 7; *Rooks v. H., etc., R. R. Co.*, 10 App. Div. 98; *Moebus v. Herrman*, 108 N. Y. 349.) The question as to the negligence of the defendant in the operation of its cars is not now before this court, but there was, however, evidence in the case sufficient to require the submission of the question of defendant's negligence to the jury. (*Schwarzbaum v. T. A. Ry. Co.*, 54 App. Div. 164; *Degraw v. E. R. R. Co.*, 49 App. Div. 29; *Duncan v. U. Ry. Co.*, 39 App. Div. 497; *Smith v. M. R. R. Co.*, 7 App. Div. 253; *Wells v. B. R. R. Co.*, 58 Hun, 389; *Adams v. B. R. R. Co.*, 57 App. Div. 241; *Vook v. N. C. R. R. Co.*, 75 N. Y. 320; *Finn v. D., L. & W. R. R. Co.*, 42 App. Div. 524; S. & R. on Neg. § 485c.)

GRAY, J. The action was brought to recover damages for the death of the plaintiff's intestate; which the complaint alleged to have been caused by the negligence of the defendant, in the operation of one of its cars upon the Nostrand avenue route, in Brooklyn. The deceased was, concededly, a bright lad of fourteen years of age, with no physical defect, save that of being slightly tongue-tied, and the accident occurred at about eleven o'clock in the evening, as he was upon his way from Rockaway Beach to Bergen Beach; a trip which he had been more or less accustomed to make alone. The plaintiff's complaint was dismissed, at the close of his evidence, upon the ground that he had failed to show that the deceased was free from contributory negligence; or that the circumstances were such as to furnish inferences in that respect. The Appellate Division reversed the judgment of nonsuit and ordered a new trial of the action; from which order the defendant appeals to this court.

While the plaintiff is entitled to have the most favorable

view taken of the evidence, which he adduced in support of his cause of action, the evidence should show facts from which reasonable inferences are, directly, deducible that the deceased did not contribute, by his own negligence, to the result and the difficulty in this case is that, unless inferences were permissible to the jurors, based upon other inferences, their verdict for the plaintiff could have had no basis. Adopting the most favorable view of the facts, which the plaintiff could claim, the boy, while riding upon the front platform of a car, propelled by electric power, upon a part of Nostrand avenue, which was unimproved by buildings, was thrown, or kicked, from the car by the motorman. He picked himself up and, walking slowly, crossed the track, upon which his car had been running, and, while in the act of crossing the second, or further, track, was struck by a car returning from Bergen Beach, run over by it and from the injuries received, subsequently, died. The cause of action set up in the complaint was the negligence of the defendant's servants in so injuring him. The witness of the accident, whose evidence is depended upon and which, alone, could support a finding of the jury adverse to the defendant, was a woman; who, at the time, was about crossing the defendant's tracks from the direction in which the deceased was proceeding. In substance, she testified that her attention was attracted by the boy's screaming upon the platform, as though endeavoring to have the motorman stop the car; that, thereupon, the latter kicked the boy off and the car continued on its way; that the boy, who had fallen upon a path, or sidewalk, alongside the track, picking himself up slowly, walked, lamely, back a short distance and proceeded to cross over the tracks, and that the car from the beach, coming at a high rate of speed, struck him, threw him up in the air and, as he fell upon the track, went over him. There was no crossing at this place, which was more or less lighted by clusters of electric light, and the car, itself well lighted up, was about one hundred and twenty-five feet distant, at the time the deceased attempted to cross. To what extent he was injured by being

N. Y. Rep.] Opinion of the Court, per GRAY, J.

thrown, or kicked, from the car did not appear; further than that the witness testified to his walking slowly and lamely. We may assume that he was injured by the fall; but the action was not brought for that injury. It was brought because of his being, subsequently, run over and thereby injured to the extent of causing his death. It does not appear that he either looked, or listened, when undertaking to cross the road, and the evidence discloses nothing of his condition, or of his actions, beyond what has been mentioned. The court is not enlightened by one fact, proving, or tending to prove, that the deceased was vigilant, to that degree, which, under the circumstances, it was incumbent upon him to be, in attempting to cross a railroad track, and without which, notwithstanding the possible negligence of the defendant in running over him, he could not, himself, have maintained an action for the injury received.

The respondent, however, argues, and that was the theory of the reversal by the Appellate Division, that the boy's fall from the moving car upon the pavement "may have rendered him for the moment unable to exercise his faculties with normal acuteness," and that, therefore, he could "neither appreciate nor avoid the impending danger." Perhaps that may have been his condition and perhaps not. That it was such is purely a matter of conjecture. No one can say so and no fact testifies to it; unless we may predicate of a slow and limping walk an impairment of the senses of sight and hearing. To have permitted the jurors to pass upon the case would have been, very clearly, to permit them to indulge in mental speculations as to whether a person, violently thrown from a moving car and afterwards walking lamely, was so affected mentally, or in his capacity to see and to hear, as to be incapable of appreciating the danger of crossing a railroad track. As a purely mental speculation, or guess work, sympathy would, inevitably, have cast its weight in the scales against the defendant. What would a verdict for the plaintiff have rested upon? Certainly, it could not rest upon facts established by the evidence, or upon inferences from facts. It would

Statement of case.

[Vol. 178.]

have rested upon inferences, which, in turn, would have rested upon other inferences. That is to say, first inferring from his slow and lame movements that the deceased had been injured by his fall from the car and, then, that the injury was in the head, the jurors would have had to infer, further, that it was such as incapacitated him to make use of his powers of sight and of hearing, or to judge of the peril of a situation. Would the verdict for the plaintiff have withstood the test of a motion to set it aside? I think not and I think that the rule, settled by repeated decisions of the court, in such cases, would be violated by permitting such a case to be submitted to a jury. I think that the evidence pointed as much in the direction of the negligence of the deceased, as to his freedom from negligence. If he had looked and listened, as he was bound to do, there was nothing to show that he could not have seen the approaching car and, as I have already said, that he was unable to take those usual and necessary precautions, was a matter of pure guess work and not of a reasonable inference from proven facts.

In my opinion, the nonsuit at the Trial Term was proper and, therefore, I advise the reversal of the order appealed from and that the judgment entered at the Trial Term should be affirmed, with costs in all courts.

PARKER, Ch. J., HAIGHT, CULLEN and WERNER, JJ., concur; BARTLETT, J., dissents; O'BRIEN, J., absent.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* ROBERT CHAPPEL, Respondent, *v.* GUSTAV LINDENTHAL, as Commissioner of Bridges of the City of New York Appellant.

CIVIL SERVICE — NEW YORK CITY — VETERAN VOLUNTEER FIREMAN DISCHARGED FROM MUNICIPAL POSITION FOR "LACK OF WORK" NOT ENTITLED TO REINSTATEMENT OR TO POSITION HELD BY ANOTHER EMPLOYEE. A bridgetender employed upon a bridge connecting the boroughs of Brooklyn and Queens, in the city of New York, who was discharged by the commissioner of bridges for "lack of work," because

N. Y. Rep.]

Statement of case.

the bridge was taken down that a new one might be constructed, is not entitled to a peremptory writ of mandamus commanding the commissioner of bridges to reinstate him in such position or to "transfer him to duty in any other branch of the civil service of the city in such position as he may be fitted to fill, receiving the same compensation therefor," upon the ground "that he is an honorably discharged volunteer fireman" and as such "entitled to the protection of the Civil Service Law, and that his discharge from his position was not for incompetency or misconduct," where the taking down of the bridge in question made unnecessary the positions of bridgetenders during the work of reconstruction and such positions were wholly abolished, since the granting of such mandamus would result either in imposing upon the city the expense of maintaining the relator in his position, when the work for which he had been employed had ceased, or in removing some employee, perhaps better or equally qualified and faithful, to make a vacancy for the relator.

People ex rel. Chappel v. Lindenthal, 79 App. Div. 48, reversed.

(Argued February 10, 1903; decided February 17, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 9, 1903, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to require the defendant to reinstate the relator in the position of bridgetender in the city of New York.

The facts, so far as material, are stated in the opinion.

George L. Rives, Corporation Counsel (James McKeen of counsel), for appellant. It was not the duty of the commissioner on discovering that the Grand street bridgetenders were no longer required to create vacancies for so many of them as happened to be veteran firemen by discharging men who were employed at other bridges. (*Matter of Breckenridge*, 160 N. Y. 107.) The construction of section 21 of the Civil Service Law, that a man not a veteran fireman, but who holds a position in the service after competitive examination, must be discharged in order to make way for a veteran fireman, is at variance with the civil service provisions of the Constitution. (*Matter of Keymer*, 148 N. Y. 219; Const. of N. Y. art. 5, § 9.)

George L. Glaser for respondent. The relator stated in his affidavit all necessary issuable facts to bring him within the protection of section 21 of the Civil Service Law. (L. 1889, chs. 208, 283 ; L. 1895, ch. 450.) The defendant, in his answering affidavit, does not controvert or deny any of the material allegations ; therefore, the relator should be granted the relief prayed for in this application. (*Matter of Sullivan*, 55 Hun, 285 ; *People v. Board of Police*, 107 N. Y. 236 ; *Matter of N. Y., L. & W. R. R. Co.*, 99 N. Y. 12 ; *People ex rel. v. N. Y. C. & H. R. R. Co.*, 168 N. Y. 187.) The contention that the relator was appointed to a particular office, the tenure of which was to depend on the existence of the Grand street bridge and the duties of which were to be limited to that bridge, is untenable. (*People ex rel. v. Morton*, 24 App. Div. 536 ; *Matter of McCloskey v. Willis*, 15 App. Div. 594 ; *People ex rel. v. Cram*, 34 App. Div. 313.) The power of removal is limited to incompetency or misconduct shown after a hearing, upon due notice, upon stated charges. (*Matter of Stutzbach v. Coler*, 168 N. Y. 421.)

GRAY, J. The relator seeks reinstatement in the position of bridgetender, in the employment of the bridge department of the city of New York, and he petitions for the writ of mandamus, commanding the commissioner of bridges to so reinstate him, or to "transfer him to duty in any other branch of the civil service of the city in such position as he may be fitted to fill, receiving the same compensation therefor." The grounds for this application are stated to be that he is an honorably discharged volunteer fireman ; that he is entitled as such to the protection of the Civil Service Law, and that his discharge from his position was not for incompetency, or misconduct, but for the reason given of "lack of work." He claims that his employment being within the operation of the Civil Service Law, the commissioner of bridges could not remove him from his position, and that, if the same had become unnecessary, or was abolished, he must transfer him "to any branch of the service of the city of New York for

N. Y. Rep.]

Opinion of the Court, per GRAY, J.

duty in such position as he may be fitted to fill, receiving the same compensation therefor." He alleges that "there remains to be done in the Bridge Department of the City of New York the same kind of work as done by him and that others not entitled to the benefits and protection of the civil service law are retained to do it." In opposition to the application, the commissioner of bridges showed by his affidavit that the petitioner held the position of bridgetender on a certain bridge, connecting the boroughs of Brooklyn and Queens; that the bridge was taken down, in order that a new one might be constructed, and, when there was no further work for the bridgetenders thereon to do, that all of them were discharged upon the ground, stated in the notice to them, of lack of work; that the position of bridgetender on the particular bridge "was made unnecessary, in the manner above stated, and was abolished for reasons of economy." He alleged that the petitioner's appointment was in the class, known as the labor class, in the classification of the civil service commission; that no vacancy existed in the bridge department, in any position, or employment, which the petitioner was fitted to fill, or in any corresponding, or similar, position, or employment, where there was any need for his services, and that the petitioner and the other bridgetenders employed on the bridge were discharged in good faith, and for no other reasons than those stated.

At the Special Term, the writ of mandamus was granted, to the extent of ordering the reinstatement and assignment to duty of the petitioner, and the order directing its issuance has been affirmed by the Appellate Division, in the second department; the right to the writ being upheld upon the authority of *Matter of Stutzbach v. Coler*, (168 N. Y. 416). In the first place, we may dismiss the petitioner's claim that the commissioner should "transfer him to duty in any other branch of the civil service of the City," as absurd. The commissioner, who is the sole defendant, has no such power and the proposition to be discussed is, merely, whether he can be compelled to reinstate the petitioner, under the circumstances

disclosed. I think that the courts below have quite misapprehended the effect of our decision in the *Stutzbach* case and that the decision of this case falls within the principle of what we held in *Matter of Breckenridge* (160 N. Y. 103). In both of those cases the question discussed related to the measure of protection, which the veteran enjoys when holding a position by appointment or employment. In the *Breckenridge* case, the relator held the office of confidential examiner in the fire marshal's bureau, and the office was abolished in good faith and as a matter of economy. His claim of a right, as a veteran, to be appointed to some other position in the department, with the same salary, notwithstanding the abolishment of the office which he had been filling, was denied upon the grounds, that he had not shown, as he was bound to show, that any position was vacant, which he was qualified to assume the duties of, and that the commissioner had shown, by his return to the petition, that there was no position to which he might transfer the petitioner. We held that the petitioner was not vested, under the Veteran Act, with an unqualified right to be retained in the service, whether a position was vacant which he might be fitted to fill, or not, and that, within a reasonable and perfectly fair construction of the law all that a veteran, who loses his office through its abolishment can demand is that he shall not be discharged from the public service, if there is in any branch of that service a vacant position, with equal emoluments, which he is qualified to fill. As to whether such existed for Breckenridge, the return of the commissioner was conclusive. In the *Stutzbach* case, however, the facts were altogether different. Stutzbach was one of fourteen men in the employment of the comptroller, who were dismissed because of the insufficiency of the appropriation, which had been made for the expenses of the finance department. It appeared that he was an honorably discharged veteran and that he was included in the fourteen clerks selected for dismissal by the comptroller, because he was the least competent man in the particular bureau. His right to the reinstate-

N. Y. Rep.] Opinion of the Court, per GRAY, J.

ment, which he sought in that proceeding, was sustained in this court ; because the Civil Service Act of 1899, then in force, protected him against removal, except upon charges of incompetency, or misconduct, upon which there had been a hearing. The comptroller, in selecting a certain number of his employés for dismissal, in order to meet the situation of a diminished appropriation, could not include the relator, on the ground that he considered him to be an incompetent clerk. The decision went no further than to hold that, in selecting from among the employés in the bureau those who were to be dismissed, others than veterans should first be taken. In the *Breckenridge* case, the position filled by the relator had been abolished, and, if there was no vacancy to which he could be transferred, a vacancy was not to be created by the removal of some other person for his benefit.

In the present case, the relator has chosen to rest his right to a peremptory writ of mandamus upon the case made by the return to his petition, and, therefore, the facts stated in the affidavit of the commissioner must be regarded as conclusive. They are that the taking down of the bridge in question made unnecessary the positions of bridgetenders during the work of its reconstruction and that those positions were wholly abolished. The relator suffered from no discrimination in removal, but from the fact that there was no work for bridgetenders to perform on the bridge where they had been employed. His claim that, notwithstanding the positions of bridgetenders upon this bridge had been abolished, he was entitled, as of right, to be reinstated in his position, or that some other person, employed in a similar capacity elsewhere in the department, should be discharged, would result, if granted, in accomplishing too gross an injustice. It would result, either in imposing upon the municipality the burden of the expense of maintaining the relator in his position, when the work for which he had been employed had ceased ; or in removing some employé elsewhere, perhaps better, or equally, qualified and faithful, to make a vacancy for the relator. We will not impute to the legislature the intention to sanction

such unnecessary injustice ; or the absurdity of intending to saddle an unnecessary employé upon the city.

The relator was a laborer ; whose employment, necessarily, implied that it would continue while the work lasted for which he was employed. He was employed upon, and for, the bridge in question, with whatever technical fitness was required, and when the reconstruction of the bridge made a bridgetender's employment unnecessary, the position was as effectually abolished for the time as it was in *Breckenridge's* case.

I think the order appealed from should be reversed and that the relator's application should be denied, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN, VANN and WERNER, JJ., concur.

Order reversed, etc. _____

VITO MARINO, an Infant, by ROCCO MARTORANA, his Guardian ad Litem, Respondent, v. LOUIS A. LEHMAIER, Appellant.

1. NEGLIGENCE — EMPLOYMENT OF CHILDREN UNDER FOURTEEN YEARS OF AGE IN FACTORY — EFFECT OF LABOR LAW (L. 1897, CH. 415, § 70). Section 70 of the Labor Law (L. 1897, ch. 415), prohibiting the employment of a child under the age of fourteen years in any factory in this state, in effect declares that a child under the age specified presumably does not possess the judgment, discretion, care and caution necessary for the engagement in such a dangerous avocation, and, therefore, is not as a matter of law chargeable with contributory negligence or with having assumed the risks of the employment.

2. CIVIL LIABILITY OF EMPLOYER. The fact that the statute provides that a violation of it shall constitute a misdemeanor, and, therefore, the proprietor of a factory is criminally liable for the employment of children under the prescribed age, does not relieve him from civil liability for injuries sustained by such an employee; and in an action therefor, such employment is in and of itself some evidence of negligence in cases where the accident could not have happened but for the employment.

Marino v. Lehmaier, 62 App. Div. 43, affirmed.

(Argued January 9, 1903; decided February 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 17, 1901, reversing a judgment in favor of defendant entered

N. Y. Rep.]

Points of counsel.

upon a dismissal of the complaint by the court at a Trial Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Albert W. Venino and *Maurice Sichel* for appellant. The violation by the defendant of the Factory Law in employing the plaintiff, without any other evidence of negligence, is insufficient to support a verdict or a judgment for the plaintiff. (*Knisley v. Pratt*, 148 N. Y. 372; *Graves v. Brewer*, 4 App. Div. 327; *Higgins Carpet Co. v. O'Keefe*, 79 Fed. Rep. 900; *Thompson v. Carey Mfg. Co.*, 62 App. Div. 279; *Monzi v. Friedline*, 33 App. Div. 217; *Freeman v. G. F. P. M. Co.*, 70 Hun, 530; 142 N. Y. 639; *De Young v. Irving*, 5 App. Div. 499; *O'Connell v. Clark*, 22 App. Div. 466; *White v. Whitteman*, 131 N. Y. 631.) Assuming that the mere fact that the plaintiff was under fourteen years of age creates liability without further proof of wrongdoing or negligence on the part of the defendant, the plaintiff's case is nevertheless defective in that it fails to show that the plaintiff was free from contributory negligence. (*McRickard v. Flint*, 114 N. Y. 222.) The plaintiff by accepting the employment assumed the obvious risks incident thereto. (*Buckley v. G. P. R. Co.*, 113 N. Y. 540; *Hayes v. Bush & Denslow Co.*, 102 N. Y. 648; *Hickey v. Taaffe*, 105 N. Y. 26; *Ogley v. Miles*, 139 N. Y. 458; *Crown v. Orr*, 140 N. Y. 450; *Burns v. N. C. Co.*, 65 App. Div. 424.) The plaintiff was *sui juris* and the burden of proving the contrary rests upon the plaintiff. (*Stone v. D. D. R. R. Co.*, 115 N. Y. 104.)

George Lawyer and *William McArthur* for respondent. A person violating a public ordinance is a wrongdoer, and is necessarily negligent; and an innocent person injured by the illegal act is entitled to a civil remedy therefor. (*Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Beisigel v. N. Y. C. R. R. Co.*, 14 Abb. Pr. [N. S.] 29.) The reversal of the decision of the trial court was proper. (*Stewart v.*

Opinion of the Court, per HAIGHT, J.

[Vol. 173.]

Ferguson, 164 N. Y. 553; *Pitcher v. Lennon*, 12 App. Div. 356; *Knupfle v. K. Ice Co.*, 84 N. Y. 488; *Willy v. Mulledy*, 78 N. Y. 314.) There was no assumption of risks. (*Kain v. Smith*, 89 N. Y. 375.) Plaintiff was *non sui juris*. (*Tucker v. R. R. Co.*, 124 N. Y. 308; *Zwack v. R. R. Co.*, 160 N. Y. 362; *McCarragher v. Rodgers*, 120 N. Y. 526; *Finkelstein v. R. R. Co.*, 51 App. Div. 287; *Thurber v. R. Co.*, 60 N. Y. 326.)

HAIGHT, J. This action was brought to recover damages for a personal injury.

The defendant was engaged in conducting a printing establishment in the city of New York. The plaintiff was first employed by him as an errand boy. He served in that capacity for the period of about three months and was then set at work in the factory as a feeder of a printing press which he was required to clean every night. On the 15th of September, 1900, while he was engaged in cleaning the press, his fingers were caught between the cog wheels and cut off. The machine was not in motion at the time he commenced to clean it and the evidence is not clear as to the precise manner in which the machine was started. On receiving the injury the boy fainted and was unable to state whether he had previously taken hold of the fly wheel and in so doing started the motion of the machine. He entered the employ of the defendant when he was twelve years and ten months of age, and at the time of the accident he was thirteen years and three months old.

The Labor Law, section seventy, provides: "A child under the age of fourteen years shall not be employed in any factory in this state. A child between the ages of fourteen and sixteen years shall not be so employed, unless a certificate executed by a health officer be filed in the office of the employer." (Laws of 1897, ch. 415.) It will be observed that the first provision of this section is an absolute prohibition, without any qualification, of the employment in a factory of any child under fourteen years of age. This statute was, undoubtedly,

passed as a police regulation, designed to protect children of tender age from injuries liable to result from their employment in dangerous avocations, such as the operation of machines or presses usually found in factories. Prior to the adoption of this statute, the rule of liability of an employer is well stated by PECKHAM, J., in the case of *Hickey v. Taaffe* (105 N. Y. 26, 36). He says: "There is no doubt that in putting a person of immature years at work upon machinery which in some aspects may be termed dangerous, an employer is bound to give the employee such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position and the necessity there is for the exercise of care and caution; merely going through the form of giving instructions, even if such form included everything requisite to a proper discharge of his duties by such employee if understood, would not be sufficient. In placing a person of this description at work upon dangerous machinery, such person must understand, in fact, its dangerous character and be able to appreciate such dangers and the consequences of a want of care, before the master will have discharged his whole duty to such an employee. * * * If a person is so young that even after full instructions he wholly fails to understand them and does not appreciate the dangers arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at such work at his own risk."

In the case of *McCarragher v. Rogers* (120 N. Y. 526) the action was prosecuted to recover damages for injuries resulting to an infant thirteen years of age while employed in a factory. The rule, as laid down in that case, was to the effect that, so far as the danger is known and obvious to him, a person of immature years may be legally as responsible for his own protection as an adult, but where judgment and reflection are required to enable a person to appreciate the consequences which might result from the defective character of machinery, the question of contributory negligence of the infant is for the jury. (See, also, 1 Shearman & Redfield on Neg. § 218, and authorities there cited; *Sullivan v. India Mfg. Co.*, 113

Mass. 396; *Finnerty v. Prentice*, 75 N. Y. 615, reported in 8 Weekly Digest, 206.)

It is, thus, apparent that the knowledge and capacity of the infant, his judgment, discretion, care and caution and his ability to know and appreciate the dangers that surrounded him, even prior to the adoption of the Labor Law, were questions of fact for the jury. We do not regard the case of *Knisley v. Pratt* (148 N. Y. 372) as controlling upon the question. In that case the plaintiff was upwards of twenty-one years of age and her faculties had fully matured. She, consequently, was held to have assumed the risks of the employment. In this case the plaintiff was under the age required by the statute, and he had not arrived at that period in life in which the judgment, discretion and caution of persons ordinarily become mature.

It has been said of the last century that it was the age of invention. Machines had been devised and constructed with which very many of the articles used by mankind were manufactured. Numerous factories had been established throughout the country filled with machines, many of which were easily operated, and the practice of employing boys and girls in their operation had become extensive, with the result that injuries to them were of frequent occurrence. We think it is very evident that these reasons induced the legislature to establish definitely an age limit under which children shall not be employed in factories; and, to our minds, the statute, in effect, declares that a child under the age specified presumably does not possess the judgment, discretion, care and caution necessary for the engagement in such a dangerous avocation, and is, therefore, not, as a matter of law, chargeable with contributory negligence or with having assumed the risks of the employment in such occupation.

It is now claimed that a violation of this statute by the proprietor of a factory does not subject him to civil liability for injuries sustained by his employees. There are, doubtless, numerous statutes which prohibit the doing of certain acts, the violation of which is punishable by penalties or as a misde-

meanor, in which the wrongdoer may not be civilly liable for damages. We shall not here attempt an enumeration of those statutes or to point out the reasons why civil liability does not attach. Our attention, however, has been called to no statute prohibiting the doing of an act which is dangerous to the life or health of others in which it has been held that the jury may not find negligence and a liability for damages resulting from the doing of the prohibited act. Passing the consideration of all the cases arising under the statutes and ordinances of cities regulating the signals of approaching trains and their speed, under which it has been held that the jury may find negligence, we come directly to the consideration of the cases that have arisen under the statute in question.

In the case of *Willy v. Mulledy* (78 N. Y. 310) the action was brought by the plaintiff, as administrator, to recover damages for the death of his wife. They occupied apartments in a tenement house in the city of Brooklyn, which they had rented of the defendant, the owner. A fire took place in one of the lower stories of the house, and the plaintiff's wife and child were smothered to death. The charter of the city of Brooklyn at that time required owners of tenement houses to have places of egress to the roofs and also fire escapes upon the houses, which had not been complied with. It was held that the defendant was civilly liable, and the plaintiff was permitted to recover. EARL, J., in delivering the opinion of the court, after referring to the statute, says: "Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in case of a fire. For a breach of this duty causing damage it cannot be doubted that the tenants have a remedy. It is a general rule that whenever one owes another a duty, whether such duty be imposed by a voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative, and where a duty is imposed there must be a right to have it performed. When a statute imposes a duty upon a public officer it is well

settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen." The provisions of the Brooklyn charter have, in substance, been incorporated into section 82 of the Labor Law, and are now a part of the statute under consideration.

In the case of *Stewart v. Ferguson* (164 N. Y. 553) the action was for the negligently causing the death of plaintiff's intestate by reason of the fall of a scaffold on which he was at work. Section 18 of the Labor Law prohibited persons employing laborers to work upon a scaffold from furnishing unsafe, unsuitable or improper scaffolding which is not "so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged." It was held that the plaintiff could recover. LANDON, J., writing in the case, says: "We think sections 18 and 19 of the Labor Law enlarged the duty of the master or employer and extend it to responsibility for the safety of the scaffold itself, and thus, for the want of care in the details of its construction."

In the case of *Pauley v. Steam Gauge & Lantern Co.* (131 N. Y. 90, 96) FINCH, J., after referring to the statute requiring fire escapes, says with reference thereto, that it imposed "a duty upon the owners or occupants of the prescribed class of factories, for an omission to perform which the operatives injured by the omission might recover damages." He proceeds, however, to show that in that case the owners had supplied two fire escapes upon their factory, thus complying with the statute.

In *Huda v. American Glucose Co.* (154 N. Y. 474, 481) GRAY, J., says, referring to this same statute: "It created an absolute duty, and its effect was to give a cause of action for each breach in favor of any one entitled to its observance and injured by a breach."

In Comyn's Digest, under head of Actions on Statutes (F), page 453, it is said: "So in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have

N. Y. Rep.]

Opinion per PARKER, Ch. J.

a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to said law." (See, also, *Pitcher v. Lennon*, 12 App. Div. 356; *McRickard v. Flint*, 114 N. Y. 222, and *Hover v. Barkhoof*, 44 N. Y. 113.)

We, therefore, conclude that under the evidence and the principle of these authorities, at least, a question of fact was presented for the determination of the jury, and in case it should be found that the defendant was negligent and the plaintiff, under the circumstances, was not chargeable with contributory negligence, the defendant was civilly liable.

The order of the Appellate Division should be affirmed and judgment ordered in favor of the plaintiff upon the stipulation, with costs.

PARKER, Ch. J. The legislature might have provided that an employer should respond in damages for all injuries sustained by a child under 14 years of age employed by him in violation of section 70 of the Labor Law; but instead it provided that the violator should be guilty of a misdemeanor. It would seem, therefore, that the minority of the court is right in so far as it holds that defendant was not chargeable as matter of law with all injuries that might have resulted to plaintiff while in his employ. But, while the violation of the statute cannot as matter of law charge the offender in damages for all injuries that may come to one whom the statute forbids him to employ, may not the violation of the statute in the case of injuries which could not have happened but for its violation constitute evidence of negligence to be considered by the triers of fact?

This statute was the outcome of lessons taught by experience and emphasized by recent statistics, and its purpose is to save the life and keep the body whole of children of such tender years as not to be able to exercise good judgment in their own protection and not to be trusted to take the same precautions to save themselves from harm that adults would. The statute amounts to a declaration by the state that the

employment of children under 14 years of age in a factory is so far neglectful of their lives and limbs as to make it the duty of the state in the exercise of its police power to forbid such employment and enforce its command by penalties. Now, while the offense against the state is only punishable by it as a misdemeanor, the violation of the statute is, as against the child whom the state deems incompetent to contract for such forbidden service, a wrongful and negligent act, which of itself furnishes some evidence of negligence in cases where the accident could not have happened but for an employment to work in a factory.

Now, in this case, the boy hired out to defendant as an errand boy. When he asked for an increase in wages he was set to work on the press where he received the injury. His testimony on that subject is, in part, as follows: "How I came to work there is, I was with another friend of mine looking for a job, and as we went around Beekman street, there were some other boys who got out of a place and told us there was a boy wanted at Lehmaier & Brother. So we went there and we asked if we could not work. So Ernest, the shipping clerk, engaged me there. I was engaged to run errands outside. I was to get \$3 a week. I ceased to work for Mr. Lehmaier September 15th, 1900. Ernest, the shipping clerk, set me to work there when I first went. First to run errands. *I worked two and a half or three months at errands. Then I asked for an increase in my wages, and they said they needed me upstairs, the printing machine, and they asked me if I would like to go up there; and the foreman put me up there; they put me on a Gordon machine.* I worked that machine three months or two and a half." Then this accident happened and the work stopped, because of the accident and the injury. Against such an accident the state attempted to guard this boy among others. But the defendant disregarded the law and employed and gave directions to one of the subjects of the state in violation of the state's policy, and the outcome of it was an injury to the child which could not have happened had the law been observed.

In such a case it would seem that the necessary and logical practice would be that the jury should be permitted to consider the violation of the statute, in connection with the other facts, as evidence tending to show negligence on the part of defendant.

There is much authority in support of this view. In *McGrath v. N. Y. C. & H. R. R. Co.* (63 N. Y. 522) it was held that a violation of an ordinance of a municipality regulating the speed of trains through it is some evidence upon the question of negligence and must be submitted to the jury. And that rule has been followed since in a long line of railroad cases.

In *Knuffle v. Knickerbocker Ice Co.* (84 N. Y. 488) an ordinance of the city of Brooklyn prohibited the leaving of horses attached to vehicles in any street, unless there were a person in charge or the horses were secured to a tying post. The violation of that ordinance by the driver of a wagon of defendant resulted in a runaway and the killing of a child, for which recovery was had and sustained. This court held that while the disregard of the ordinance was not conclusive evidence of negligence, yet it was some evidence for the consideration of the jury.

In *McRickard v. Flint* (114 N. Y. 222) the owner of a building neglected to comply with a statutory requirement that an elevator shaft should be protected by a railing and trap doors approved by the superintendent of buildings, and that such trap doors should be closed except when the elevator was in actual use. In an action for injuries, which would not have occurred if the statute had been complied with it was held that violation of the statute, while not conclusive, constituted some evidence of negligence, and was properly submitted to the jury.

In *Graham v. Manhattan Ry. Co.* (149 N. Y. 336) it appeared that a statute required that there should be gates on elevated trains and that they should be kept closed while the car was in motion; and it was held that a failure on the part of defendant to obey this statute constituted evidence of neg-

ligence toward a passenger who was injured while trying to save himself from being pushed from the platform by a movement of the crowd.

Willy v. Mulledy (78 N. Y. 310); *Pauley v. S. G. & L. Co.* (131 N. Y. 90); *Huda v. American Glucose Co.* (154 N. Y. 474) and *Stewart v. Ferguson* (164 N. Y. 553), referred to by Judge HAIGHT, tend in the same direction.

I concur with Judge HAIGHT for affirmance.

O'BRIEN, J. (dissenting). This case presents but a single question and it is quite important to keep that question clearly in view and avoid confusing it with other questions. The question is, whether the employment of a boy thirteen years and nine months of age is in and of itself proof of negligence in an action against the master. No one denies the proposition that the employment of a boy of tender years to work upon a dangerous machine, without giving him proper instructions, constitutes some proof of negligence, without any statute on the subject. But that principle has no application to this case for the reason that no one claims, or can claim, that a printing press with the power cut off is a dangerous machine, or that the plaintiff needed any instructions as to how it could be cleaned, for he had, at the time of the accident, been engaged in doing that very thing for a month. The plaintiff was nonsuited at the trial, but the learned Appellate Division reversed the judgment, and the ground upon which it was reversed is very clearly and concisely stated in the opinion, as follows: "We agree with the court below that there was no evidence to show that the injury to the plaintiff was caused by the negligence of the defendant, unless the evidence that the plaintiff was employed in a factory in violation of § 70 of the Labor Law (Ch. 415, Laws of 1897) justified a finding that the defendant was guilty of negligence." Here we have the precise question in this case stated in such a manner that it is impossible to confuse it. I do not think that the mere employment of the plaintiff, although in violation of the Labor Law,

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

was any proof of actionable negligence. The rule on that subject is well stated in a recent work on the law of negligence, in which the learned author has exhaustively considered the subject in all its aspects and various distinctions, and the rule with respect to the question involved in this case is stated in the following terms: "There are many statutes and municipal ordinances which forbid the doing of acts the violation of which does not necessarily give any right of action in favor of private individuals; the offense being against the public to be redressed in the one case in a criminal prosecution or in an action brought in behalf of the State by the attorney-general, and in the other by a prosecution in a municipal court. And it may be stated as a general proposition, though there may be difficulty in some cases in applying it, that the violation of a statute or municipal ordinance is not of itself a cause of action grounded upon negligence in favor of an individual unless the statute or ordinance was designed to prevent such injuries as were suffered by the individual claiming the damages and often not then, the question depending upon judicial theories and surmises." (1 Thompson on Negligence, § 12.) In *Knisley v. Pratt* (148 N. Y. 372) a young woman lost her arm while working upon a punching machine in a hardware factory. The Factory Act required the cog wheels of such machines to be guarded, and the injury occurred through the lack of such guard in cleaning the machine while in motion. There was in that case a clear omission to observe the provisions of the Factory Act, and yet it was held that the master was not liable. It is no answer to the decision in that case to say that the injured girl was over 21 years of age, since the statute was as clearly violated as to a person of that age as of any other. The matter of age did not enter into the question at all. The sole question was whether the statute created a cause of action in favor of the injured party, and it was held that it did not.

So in this case the judgment must stand or fall upon the undisputed fact that, at the time when the plaintiff was put to work in the printing establishment of the defendant, he was

under the age of fourteen years. He was over thirteen, but lacked a few months of fourteen. It does not appear that the defendant knew anything about the age of the boy or that he made any inquiries on that subject. The statute, which is known as the Factory or Labor Law, enacts that "A child under the age of fourteen years shall not be employed in any factory of this State." (L. 1897, ch. 415, § 70.)

It is assumed for all the purposes of this case that the violation of this provision of the statute subjects the employer to some penalty, civil or criminal. The real question, however, is whether it subjects the employer to a civil liability under the general law of negligence. There is nothing in the statute from which it can be inferred that the legislature intended to repeal or change any of the rules of law which, prior to its enactment, were settled in actions of negligence. There is nothing in the statute to indicate that the legislature intended to create any new cause of action or any new ground of civil liability. It sought to regulate the employment of labor in factories and otherwise to a considerable extent, but it left actions for personal injuries on the ground of negligence just where they were before. Now what has been decided in this case is that the mere fact of the employment of the plaintiff upon a printing press before he had arrived at the age of fourteen years, was such proof of negligence on the part of the defendant as would authorize a jury to render a verdict against him for the damages that the plaintiff sustained in consequence of the injury. That is the proposition which this appeal presents. It is quite obvious that the employment of a lad between thirteen and fourteen years of age to work around a printing press is not an act which at common law was any proof of negligence. The employment of boys under that age at some suitable work did not ordinarily subject the employer to civil liability for accidents that might happen to them in the performance of their work. It is true that if a boy of tender years was put upon work at dangerous machinery, not being apprised of the danger or instructed in the manner of using the machine, the master

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

could be held liable for negligence in that respect, but this case does not involve any question of that kind. It is not claimed that the work itself was dangerous or unsuitable for a boy of plaintiff's age. It is not claimed that the machine itself was dangerous when in operation or otherwise, and certainly it is not claimed that when the power was shut off and the machine was completely stopped that it was dangerous to employ the plaintiff in cleaning it, so the defendant's liability, if he is liable at all, must rest upon the fact that he disobeyed the statute.

Thus the question arises here whether every act which is forbidden by law with a penalty, civil or criminal, attached, subjects the doer of the act to civil damages at the suit of another party claiming to be injured by the act. There are numerous statutes that prohibit the doing of certain acts, with civil or criminal penalties attached, which are not in their nature or character negligent acts. For instance, a witness who signs a will without attaching his place of residence to his signature is subjected to a penalty, but no one, I think, would suppose that his omission was of such a character as would subject him to an action of negligence at the suit of some one claiming to be injured. There are a multitude of police regulations, revenue laws and game laws that forbid the doing of certain things, and penalties, civil or criminal, or both, are prescribed for a violation; but it would be difficult to show that negligence could be predicated of the act in addition to the penalties. They are generally acts that are *mala prohibita* and not *mala in se*. It is, doubtless, within the power of the legislature to change the law of evidence as applicable to negligence and to prescribe that the violation of a statute shall be followed by civil liability at the suit of the person injured, but nothing of that kind is to be found in the statute in question. A negligent act must be determined from its real character and nature with reference to the duties imposed upon the actor by law and is not to be predicated upon the mere violation of some statute unless the prohibition is of an act which was negligent before

the statute was passed or was some proof of negligence; for instance, it has been held that the violation of a municipal ordinance prohibiting a party from allowing horses to stand untied in the street was proof of negligence, but that would be so if the ordinance never had been passed. In *Willy v. Mulledy* (78 N. Y. 310) a fire took place in one of the lower stories of a tenement house and the plaintiff's wife and child were smothered to death. It seems that the charter of the city required owners of tenement houses to have places of egress to the roofs and also fire escapes, which had not been complied with, and it was held that the defendant was civilly liable and the plaintiff was permitted to recover. That was a case where the statute came in to help the common law. A person who lets a house to tenants without any means of escape from fire does not perform his duty to the tenant and may be held liable for negligence without any statute. The case of *Stewart v. Ferguson* (164 N. Y. 553) was one in which a person was injured by the fall of a scaffold on which he was at work. Section 18 of the Labor Law prohibited persons employing laborers to work upon a scaffold from furnishing unsafe, unsuitable or improper scaffolding. It was held in that case that the plaintiff could recover, but he could recover just as well before the statute upon proof that the scaffold was unsafe or made of unsuitable materials. That was not a case where the statute created a cause of action. So it is with respect to all the cases cited. None of them establishes the proposition which is contended for in this case, namely, that the violation of a statute forbidding the employment of persons under fourteen years of age is *per se* proof of negligence. It will not do to say that there was a question of fact, for there was none. There was no dispute about the violation of the statute, and its violation proved negligence or it did not. If it did, then the plaintiff was entitled to recover as matter of law, and there was nothing for the jury to do except to assess the damages. If it did not prove negligence then the action failed.

There are many statutes which prohibit the taking of fish and game at certain seasons of the year and subject persons who violate those statutes to civil or criminal penalties; but no one, I think, would claim that if the hunter or fisherman who was engaged in violating the law inflicted an injury upon his attendant or helper, that the violation of the law would have anything to do with his liability for the injury. Smuggling or the violation of revenue laws is an act which is forbidden by statute, but if a person engaged in violating the statute should inflict an injury upon another, the character of the injury, whether actionable or otherwise, would not depend in any degree upon the fact that he was at the same time engaged in violating some law. In other words, penal or prohibitory statutes, as a general thing, are intended to regulate the conduct of individuals, and the violation of such laws may subject the individual to liability to the state, but it does not necessarily follow that as between himself and his neighbor it is an act of negligence that may be made the foundation for civil liability. The legislature once made it a crime to feed a sparrow (L. 1887, ch. 641), but no one, I think, would ever contend that a violation of that statute constituted actionable negligence in a suit by any one. The legal consequences of the violation of a statute forbidding some act that but for the statute was perfectly lawful, do not extend beyond the statutory penalty.

Hence it follows that the violation by the defendant of the Labor Law, while it may have subjected him to the penal consequences prescribed, did not prove or tend to prove that he thereby incurred a liability to the plaintiff on the ground of negligence. This principle is illustrated in a great variety of cases that arose under statutes of the same character. In *Brown v. Buffalo and State Line R. R. Co.* (22 N. Y. 191, 198) this court quoted a remark of the court in *People v. Stevens* (13 Wend. 341): "Where a statute creates a new offense, by making that unlawful which was before lawful, and prescribes a particular penalty and mode of proceeding, that penalty can alone be enforced." The language of Lord

MANSFIELD in *Rex v. Robinson* (2 Burr. 800) was also quoted: "The rule is certain that where a statute creates a new offence, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful), by a particular sanction and particular method of procedure, that particular method of proceeding must be pursued and no other." And also the language of Chief Justice HOLT in *Bartlett v. Vinor* (Carth, 252): "A penalty implies a prohibition, though there be no prohibitory words in the statute." The court then proceeded to state that "the principle is a very ancient one, and has never been departed from. It is a most rational interpretation of the lawmaking power. On passing the act or the ordinance in a case where the thing prohibited was lawful before, the lawmakers say to each member of the community, if you do this thing, and as often as you do it, you shall pay such penalty. That is the whole of it. The act of the defendant in this case, of running their train faster than six miles an hour, was, indeed, unlawful, but no more so than if there had been no prohibition in express terms in the ordinance. * * * The act was unlawful, *sub modo*, not in an absolute sense, so as to make the defendant liable to third parties for all its consequences, but it was unlawful as being prohibited by a law, which declared the consequence of every act of violation of its provisions to be the payment of a specific sum of money by way of penalty." A statute of this state (Penal Code, § 363) makes it a misdemeanor for a person who transacts business to use the designation "& Company" or "& Co." when no actual partner or partners are represented thereby. This court held in a recent case that an executory contract or agreement executed in such a name in violation of the statute could be enforced and that a violation was no defense. Judge GRAY said that "It simply made it a misdemeanor to do what was therein specified and that is all. To extend its operation as far as the plaintiff would have it would be to give a construction to it which would permit of its injurious operation upon persons whose dealings with

N. Y. Rep.]

Dissenting opinion, per GRAY, J.

the guilty party had been made in entire good faith. Such a construction would be foreign to the purpose of the enactment, contrary to public policy and without support in legal principles." (*Sinnott v. German American Bank*, 164 N. Y. 391.) Practically the same doctrine was announced in a prior case. (*Gay v. Seibold*, 97 N. Y. 472.) So it was held in the case of *Wood v. Erie Ry. Co.* (72 N. Y. 196) that it is no defense to an action against a common carrier for the loss of goods to show that the owner was doing business in violation of that statute and shipped the goods under the fictitious name; so the conclusion is reached that in this case the defendant simply subjected himself to whatever penalty the law fixed to the prohibited act, but his violation of the statute did not create a cause of action in favor of the plaintiff for the recovery of civil damages on the ground of negligence.

The judgment of the Appellate Division should, therefore, be reversed and that entered on the decision of the trial court affirmed, with costs.

GRAY, J. (dissenting). I concur with the opinion of Judge O'BRIEN that the order of the Appellate Division should be reversed and that the judgment entered upon the decision of the trial court, dismissing the complaint, should be affirmed.

Briefly, my reasons are these: A breach of a statute, which imposes a duty upon any person, may give a cause of action for damages to one who has an interest in its observance, when he shows that the injury was the direct, or necessary, result of the breach. (*Willy v. Mulledy*, 78 N. Y. 310; *Huda v. American Glucose Co.*, 154 ib. 474.) This is the reasonable doctrine of our decisions and this court has not, as yet, gone so far as my brother HAIGHT would have it go; that is to say, to the extent of holding that the breach of a statutory duty subjects the offender to a civil liability for an injury sustained, even if, as in this case, it is not referable to the breach as a cause. The plaintiff should not have been employed by the defendant and for a violation of the law, in that respect, the defendant rendered himself amenable to the

punishment prescribed by the statute, and, undoubtedly, if there could have been a direct connection between the illegal employment and the injury suffered by the plaintiff, proof of the illegal employment would be proof of the defendant's negligence to be submitted to the jury. Such was the question in the case of *Huda v. Glucose Company*; where the windows of a factory were screwed down, for the furtherance of manufacturing purposes, and the plaintiff had contended that the statute relating to fire escapes had been violated and gave to her a cause of action. In *Willy v. Mulledy* the failure to comply with the statute relating to fire escapes was held to render the defendant liable for the damages caused by the death of the plaintiff's wife, as the result of a fire in the building where they were dwelling and with respect to which the statute had not been complied with.

In those cases, as in that of *Stewart v. Ferguson*, (164 N. Y. 553), the breach of the statutory obligation to provide for the safety of others, who had a special interest in its observance, had some direct relation to, or bearing upon, the result of the injury to them. But, in the present case, the plaintiff's injury was unexplained. The machine was not in motion at the time and the power was cut off. The place was, therefore, safe enough and no affirmative act of negligence can be chargeable to the defendant, under the circumstances disclosed by the proof; unless the mere violation of the statute is held to constitute such, and that, I think, is an unsound proposition. It is contrary to the ordinary rules of law in such cases and, in my opinion, it is giving an unwarranted operation to the statute. The cause of the injury was not the employment of the boy.

MARTIN, VANN and CULLEN, JJ. (and PARKER, Ch. J., in memorandum), concur with HAIGHT, J.; GRAY and O'BRIEN, JJ., read dissenting opinions.

Order affirmed, etc.

HENRY MUHLKER, Respondent and Appellant, v. THE NEW
AND HARLEM RAILROAD COMPANY et al., Appellants and
Respondents.

RAILROADS—NEW YORK AND HARLEM RAILROAD COMPANY NOT
LIABLE FOR CONSEQUENTIAL DAMAGES RESULTING FROM ERECTION OF
STEEL VIADUCT UPON WHICH ITS TRAINS ARE RUN IN AND THROUGH
FOURTH AVENUE IN NEW YORK CITY—L. 1892, CH. 339. The New
York and Harlem Railroad Company, which, previous to the enactment
of chapter 339 of the Laws of 1892, had acquired, as against the abutting
owners, the right to maintain its railroad through, in and along Fourth
avenue in the city of New York, through a subway constructed for that
purpose, is not liable to an abutting owner for damages that may have
been suffered by him by reason of any interference with his easements of
light, air and access caused by the change in grade of the railroad and
the erection of the steel viaduct upon which its trains are now run, the
grade having been changed and viaduct erected by the state under and in
pursuance of such statute for the purpose of compelling the company to
operate its railroad thereon in order to give the public the use of the whole
of the surface of Fourth avenue, which was impossible before the erec-
tion of the viaduct, since the state had the power to enact the statute
and to change the grade of the railroad and construct the viaduct for the
purpose of improving the street for the benefit of the public, without
compensation to the abutting owners, and the railroad company having
previously acquired the right to move its trains over the street, which
could not be taken from it, did not lose that right and become a trespasser
because it obeyed the command of the statute, which it could not refuse
to obey, to operate its trains upon the structure which the state had built.

Muhlker v. N. Y. & Harlem R. R. Co., 60 App. Div. 621, reversed.

(Argued October 16, 1902; decided February 24, 1903.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the first judicial department, entered April
29, 1901, affirming a judgment in favor of plaintiff entered
upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material,
are stated in the opinion.

L. M. Berkeley and *James C. Bushby* for plaintiff, respond-
ent and appellant. This case is not controlled by the case of

Fries v. N. Y. & Harlem R. R. Co. (169 N. Y. 270), which was decided upon the particular findings made in that case by the court below. In the case at bar there are fundamental distinctions between the two cases. (*Matter of Attorney-General*, 155 N. Y. 442; *Demarest v. Mayor, etc.*, 147 N. Y. 203; *Curtin v. Barton*, 139 N. Y. 510; *Boyd v. Alabama*, 94 U. S. 648.) Chapter 339 of the Laws of 1892 is unconstitutional in that it provides for the taking of private property without due process of law. (*Story Case*, 90 N. Y. 168, 171, 179; *Lahr Case*, 104 N. Y. 288; *Fobes Case*, 121 N. Y. 517; *Abendroth Case*, 122 N. Y. 17; *Bohm Case*, 129 N. Y. 587; *H. R. T. Co. v. W., etc., R. Co.*, 135 N. Y. 407; *Sperb Case*, 137 N. Y. 160; *C., etc., R. Co. v. Chicago*, 166 U. S. 226; *Tindal v. Wesley*, 167 U. S. 222; *Holden v. Hardy*, 169 U. S. 390.) Chapter 339 of the Laws of 1892 is unconstitutional in that it impairs the obligation of a contract. (*Story v. El. R. R. Co.*, 90 N. Y. 177; *Kane v. El. R. R. Co.*, 125 N. Y. 185; *White Case*, 139 N. Y. 25; *People v. Comrs.*, 53 Barb. 74; *Lahr v. M. Ry. Co.*, 104 N. Y. 290; *Fletcher v. Peck*, 6 Cranch [U. S.], 137; *Green v. Biddle*, 8 Wheat. [U. S.] 92; *Davis v. Gray*, 16 Wall. [U. S.] 232; *Hall v. Wisconsin*, 103 U. S. 5; *Wolff v. New Orleans*, 103 U. S. 367.) The rule of *damnum absque injuria* has no application to this case. (*Hill v. Mayor, etc.*, 139 N. Y. 502; *Huffmire v. Brooklyn*, 162 N. Y. 591; *Garvey v. L. I. R. R. Co.*, 159 N. Y. 332; *Cogswell v. N. Y., etc., R. Co.*, 103 N. Y. 10; *Lahr Case*, 104 N. Y. 293; *Bohan v. P. J. G. L. Co.*, 122 N. Y. 23, 24, 29; *Booth v. R., etc., R. Co.*, 140 N. Y. 277; *B., etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Eels v. A. T., etc., Co.*, 143 N. Y. 140.)

Ira A. Place, Thomas Emery and Alex. S. Lyman for defendants, appellants and respondents. The decision of this court in the case of *Fries v. New York & Harlem Railroad Company* is absolutely controlling of this appeal. (*Fries v. N. Y. & H. R. R. Co.*, 169 N. Y. 276.) The rule of *damnum absque injuria* applies to the situation at bar.

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

(*People v. O'Brien*, 111 N. Y. 1; *Radcliffe v. Mayor, etc.*, 4 N. Y. 195.)

PARKER, Ch. J. The facts of this case present the same question that was before this court in the *Lewis Case* (162 N. Y. 202) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its trains along and over Fourth avenue. (*Fries Case, supra*)

In 1890 Congress passed an act directing the secretary of war to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges, compliance with the provisions of this act made

necessary a change in the grade of defendant's railroad, and the act provided that such changes should be made as soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street which before was impossible.

This improvement was made by the state for the benefit of the public, the expense of it, by the mandate of the state, being borne by the city and this defendant in equal proportions. What was done by the state and the legal effect of its action upon the rights of this defendant cannot be better stated than it was by Judge VANN in the *Lewis Case* (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the state did. (*Atwater v. Trustees of Vil. of Canandaigua*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power,

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company 'had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it."

Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, briefly, that the state,

setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would — and probably would not if it could — deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

When the question was again presented, therefore, as it was in the *Fries Case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'BRIEN and Judge MARTIN. In the course of Judge O'BRIEN's opinion it is said :

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement, for

which the railroad was not responsible.' The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria*."

Judge MARTIN states the principle as follows: "It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact."

The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the *Reining Case* (128 N. Y. 157) as authority for the proposition that "while the public authorities may raise the grade of a street for a street use, or may authorize the construction of a surface

railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the state did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the state compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point. There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the *Fries* case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'BRIEN said, in discussing the constitutional question: "I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge MARTIN commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge CULLEN said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of *Radcliff's Executors v. Mayor, etc., of Brooklyn* (4 N. Y. 195) and the other cases cited by Judge MARTIN in his opinion in the *Fries* case, that the state had the power to make this improvement, as it did, without compensation to the abutting owners. Undoubtedly the

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its Court of Claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, J. (dissenting). This is one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the Appellate Division was entered on the 29th day of April, 1901.

The case of *Fries* against these defendants was not decided in this court until December 31st, 1901. (169 N. Y. 270.)

The plaintiff appealed from the judgment on the ground

that he was limited in his recovery by an improper rule as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the *Fries* case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these cases as follows: (1) That in the *Fries* case there was a finding that the defendants had "acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same.

(The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the *Fries* case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed to the Harlem Railroad Company 24 feet in Fourth avenue, but at that time he had nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation. (*Lewis Case*, 162 N. Y. 202.)

It is true that Poillon's deed to the city was never recorded, but this was not essential in order to create a highway. (*Driggs v. Phillips*, 103 N. Y. 77.) Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these dates the city began condemnation proceedings to widen Fourth avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street, was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed sometime in the year 1850.

The changes in Fourth avenue, as it was then called, and the railroad structure under the act of 1872, resulted in a new

state of affairs as to the grade of the tracks, both on viaducts and in cuts, which were not completed until 1878. It, therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in question, the effect of the act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So we have the case of a change of grade in a street, which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park avenue. The title of chapter 339 of the Laws of 1892 reads: "An act to regulate, improve and enlarge Park avenue above 106th street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal government determined to raise the height of the bridge which was in use by the railroad companies. The state of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by section thirteen to appoint a board to be known as "The Board of the Park Avenue Improvement above 106th street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the Special Term of the Supreme Court in the first department for the appointment of commissioners to determine the area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the *Fries* case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or

negligence, in the performance of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the state was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad company, is conclusive evidence that it does not contemplate a public work, inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smokestacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge, they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the *Fries* case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed any portion of the cost of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation, and introduced in the *Fries* case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

These cases present a situation covered by the case of *Reining v. N. Y., L. & W. Ry. Co.* (128 N. Y. 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge ANDREWS, in applying the law of elevated railroad cases, as laid down in the *Story* case, said: "It is no longer open to debate in this State that owners of lots abutting on a street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this state, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the states by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated rail-

road cases is applicable here and that the decision in the *Fries* case reversed a rule of property under which millions of dollars have been paid out by the elevated railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that the city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty-four feet wide.

The details of the railroads' title were carefully and elaborately examined in the *Lewis Case* (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the state, then these damages are a valid claim against the state.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the *Fries* case. I understand that the court desires a full and free discussion of this entire question. I shall be content, if a result is reached in these cases adverse to the plaintiff, so long as I place myself on record as dissenting, on the ground that it reverses the *Lewis* case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the state.

If this judgment is reversed it should be without costs.

I vote for affirmance.

N. Y. Rep.]

Statement of case.

CULLEN, J. (dissenting). I concur in the opinion of Judge BARTLETT and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the *Fries* case may be fairly set off that of the *Lewis* case. But the court, having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

HAIGHT, MARTIN and WERNER, JJ., concur with PARKER, Ch. J.; BARTLETT, J., reads dissenting opinion, and CULLEN, J., concurs in memorandum; GRAY, J., not sitting.

Judgment reversed, etc.

FRANK CATTANO, as Administrator of the Estate of PAUL CATTANO, Deceased, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

1. NEGLIGENCE — INJURY RESULTING FROM OVERCROWDED PLATFORM OF HORSE CAR — WHEN NEGLIGENCE OF RAILROAD COMPANY A QUESTION OF FACT. When a carrier of passengers fails to provide either seats or standing room inside its cars so that a passenger must stand on the platform in order to ride at all and the company permits him to ride there, it cannot allow the platform to become so crowded that he is liable to be pushed off by an employee in operating the car without presenting a question of fact for the jury as to its negligence in the premises.

2. SAME. Where it appears in an action of negligence that the plaintiff's intestate was a passenger on one of defendant's horse cars, the seats of which were occupied, and in the aisles of which there was no standing room; that he, with seven others, was riding on the front platform, which "apparently had no room for anybody else;" that the car was going very fast on a down grade, and the driver, in his efforts to apply the brakes, "made room for himself" by backing and pushing and thus jostled the crowd and shoved the people around so that the decedent was thrown off and instantly killed, the questions of negligence on the part of the defendant and freedom from contributory negligence on the part of the decedent are properly submitted to the jury.

8. CONTRIBUTORY NEGLIGENCE. The decedent is not, as matter of law, chargeable with contributory negligence, because with knowledge of its overcrowding he stood upon the platform, in the absence of evidence that he was ever on a street car before or that he was acquainted with the grade, the method of operating the brakes or with any fact aside from the crowded condition of the platform which might expose him to danger, since the defendant is presumed to have known the situation as it actually existed and the decedent had the right to rely upon defendant to exercise a high degree of care to make the platform safe and secure for his occupation.

4. TRIAL—IMPROPER STATEMENT OF COUNSEL IN SUMMING UP—NOT THE SUBJECT OF REVIEW UNLESS PROPER EXCEPTION IS TAKEN. An improper statement of counsel in summing up should be promptly called to the attention of the court, its objectionable features pointed out, a request made for a direction to counsel to desist and to the jury to disregard, and, in case of refusal, an exception noted in order that the alleged error may be raised and reviewed upon appeal: calling attention to the subject for the first time after the charge and then taking an exception to the language used by counsel in summing up, presents no question reviewable by the Court of Appeals.

5. MOTION TO WITHDRAW A JUROR. A motion to withdraw a juror on account of the improper summing up of counsel rests in the discretion of the trial court, and an exception to its denial presents no error reviewable by the Court of Appeals.

Cattano v. Met. St. Ry. Co., 67 App. Div. 615, affirmed.

(Submitted January 9, 1903; decided February 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 18, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles F. Brown, Addison C. Ormsbee and Henry A. Robinson for appellant. The complaint should have been dismissed on the ground that no negligence was shown on the part of the defendant. (*Lehr v. S. & H. P. R. R. Co.*, 118 N. Y. 556; *Graham v. M. Ry. Co.*, 149 N. Y. 336; *Ginna v. S. A. R. R. Co.*, 67 N. Y. 596; *Hayes v. F. S. S., etc., R.*

N. Y. Rep.] Opinion of the Court, per VANN, J.

R. Co., 97 N. Y. 259.) The summing up of the plaintiff's counsel presents legal error requiring the reversal of this judgment. (*Williams v. B. E. R. R. Co.*, 126 N. Y. 96; *People v. Baldwin*, 158 N. Y. 542; *People v. Mull*, 167 N. Y. 247; *Koelyes v. G. T. & L. Ins. Co.*, 57 N. Y. 638; *Halpern v. N. El. Co.*, 16 App. Div. 90; *Bagelly v. M. J. Assn.*, 38 App. Div. 522; *Stewart v. M. S. Ry. Co.*, 72 App. Div. 459.)

Roger Foster, Thomas Gilleran and Moses Jaffe for respondent. The motion to dismiss was properly denied. (*Lehr v. S. & H. P. R. R. Co.*, 118 N. Y. 556; *Graham v. M. Ry. Co.*, 149 N. Y. 336; *Willis v. L. I. R. R. Co.*, 34 N. Y. 670; *Dawson v. Trustees of N. Y. & B. Bridge*, 31 App. Div. 537; *Ginna v. S. A. R. R. Co.*, 67 N. Y. 596; *Murray v. B. C. R. R. Co.*, 27 N. Y. S. R. 280; *McGrath v. B., etc., R. R. Co.*, 87 Hun, 310; *Schaefer v. U. Ry. Co.*, 29 App. Div. 261; *Nolan v. B., etc., R. R. Co.*, 87 N. Y. 63; *Henderson v. N. El. R. R. Co.*, 46 App. Div. 280.) The exceptions to the closing address of plaintiff's counsel were all taken too late to be available. (*Sweet v. M. O. R. R. Co.*, 87 Mich. 559; *A. G. S. R. Co. v. Hill*, 93 Ala. 514; *Mainz v. Lederer*, 21 R. I. 370; *State v. McCool*, 34 Kan. 613; *Rea v. Harrington*, 58 Vt. 181; *Ferguson v. Moore*, 98 Tenn. 342; *Crumpton v. U. S.* 138 U. S. 361; *Morrison v. State*, 76 Ind. 335; *W. U. T. Co. v. Apple*, 28 S. W. Rep. 1022.)

VANN, J. This action was brought by the plaintiff as the administrator of his deceased son, to recover damages on account of his death caused, as alleged, by the negligence of the defendant. The answer raised the usual issues in such cases.

On July 3d, 1899, the decedent, a young man about twenty years of age, was a passenger on one of the cross-town horse cars of the defendant running on 34th street in the city of New York. The car was crowded inside and out. All the seats were occupied; there was no standing room in the aisle,

and on the front platform where the decedent was riding as many as eight persons were standing. As one witness put it, "The front platform apparently had no room for anybody else." The decedent had been riding on that platform for five or six blocks, and just before the accident he stood next to the step and near the driver. As the car was going very fast on a down grade the driver, in his efforts to apply the brake, "made room for himself" by backing and pushing and thus jostled the crowd and shoved the people around so that the decedent was thrown off and instantly killed. The jury could have found these facts, although they could have found, as certain witnesses for the defendant testified, that the decedent met his death by stepping off backward and falling under the wheels. The defendant's case might have been stronger if the driver or the conductor had been called to corroborate its theory of the accident, but neither was put upon the stand.

Were these facts, which the jury is presumed to have found, sufficient to warrant the inference of actionable negligence on the part of the defendant and freedom from contributory negligence on the part of the plaintiff's intestate?

Assuming that no unnecessary force was used in operating the brake, the primary question is whether the defendant was negligent in allowing the platform to become so crowded that the driver could not use the brake without pushing away those standing near him and thus crowding off some one on the outside. It was the duty of the defendant when it allowed passengers to ride on the platform to use a high degree of care to protect them from injury. As it did not provide railings to keep them from being crowded off in case of a sudden movement in the crowd, it was bound, as the jury at least might have found, to see that the crowd did not become so dense that the driver could not put on the brake without pushing some passenger off. If there had been vacant seats or even standing room inside the case would be different, for then the passenger voluntarily standing on the platform might be held to run his own risk. When a carrier of passengers fails to provide either seats or standing room inside its cars so

that a passenger must stand on the platform in order to ride at all, and the company permits him to ride there, it cannot allow the platform to become so crowded that he is liable to be pushed off by an employee in operating the car without presenting a question of fact for the jury as to its negligence in the premises.

As was said by FOLLETT, Ch. J., in *Lehr v. Steinway & Hunters Point R. R. Co.* (118 N. Y. 556, 561): "The exposure of a passenger to a danger which the exercise of reasonable foresight would have anticipated and due care avoided is negligence on the part of a carrier. It clearly appears that the defendant undertook to carry more passengers than could sit and stand inside the car, and that both platforms and their steps were filled to their utmost capacity. The actions of persons so crowded together, and the great force which they exercise, sometimes almost unconsciously on each other, is understood by carriers of passengers and their employees, and the court would not have been justified in nonsuiting the plaintiff and holding, as a matter of law, that the exercise of reasonable foresight would not have led the defendant to anticipate that overcrowding this car and its platforms might render accidents like the one which befell the plaintiff probable. * * * Whether the defendant negligently caused the injury to the plaintiff, and whether he negligently contributed to his own injury were, under the evidence, questions of fact for the jury."

In *Willis v. Long Island R. R. Co.* (34 N. Y. 670, 683) the court said: "As the defendant in the present case neglected that duty (to furnish seats inside its cars), and the plaintiff rode on the platform because the company did not provide him with suitable and reasonable accommodations within the cars, the circumstance of his being in that position when he was injured does not relieve the defendant from liability."

In *Merwin v. Manhattan Ry. Co.* (48 Hun, 608 ; 113 N. Y. 659) both cars and platforms were so crowded that it was almost impossible for the decedent to get on. As the train

approached a station where he intended to alight, the passengers began to come out on the platform in order to get off, and owing to the pressure he stepped back, fell between the platforms and was fatally injured. It was held that the defendant ought to have foreseen that such an accident might happen and that the omission to provide suitable safeguards against its occurrence was actionable negligence. It was further held that even if it was obvious to the decedent that he would not be able at once to find a seat inside the car, yet the defendant, by taking him upon the train for the purpose of transporting him as a passenger upon the platform, was bound to exercise a high degree of care to make the platform safe and secure for his occupation and that he was entitled to assume that it would do so.

All the cases thus far alluded to were cited with approval in the recent case of *Graham v. Manhattan Ry. Co.* (149 N. Y. 336), in which it was held that where a passenger boarded an elevated railroad train and was compelled to ride upon the platform because the crowded condition of the car prevented him from occupying any other position, and he was injured while trying to save himself from being pushed from the platform by a movement of the crowd caused by acts of an employee of the company, it was a question of fact for the jury whether either party was guilty of negligence.

Even when there were vacant seats inside, and a passenger was smoking upon the front platform as permitted by the company, and was injured by the negligence of the defendant, it was held that the question of contributory negligence was one of fact for the jury. (*Nolan v. Brooklyn City & N. R. R. Co.*, 87 N. Y. 63. See, also, *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230; *Edgerton v. N. Y. & Harlem R. R. Co.*, 39 N. Y. 227; *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135.)

We think that these cases, and others which might be added, demonstrate that the trial judge properly submitted to the jury the usual questions relating to the negligence of the

N. Y. Rep.] Opinion of the Court, per VANN, J.

defendant and the contributory negligence of the plaintiff's intestate.

The argument is made that if it was negligent for the company to permit the platform to become overcrowded, it was negligent for the decedent to stand there. This argument implies that the decedent knew as much about the situation and danger as the defendant, whereas it was not shown and cannot be presumed that he was ever on a street car before, or that he was acquainted with the grade, the method of operating the brakes, or with any fact, aside from the crowded condition of the platform, which might expose him to danger. The company, of course, is presumed to have known the situation as it actually existed. Moreover, the argument ignores the legal obligation of the defendant, upon which the decedent had the right to rely, to exercise a high degree of care to "make the platform safe and secure for his occupation." Thus it is apparent that the argument, so plausible upon its face, is founded upon a presumption which does not exist and disregards a legal obligation of the defendant upon which the decedent had a right to rely.

The counsel for the plaintiff, in hastily summing up before the jury, inadvertently went beyond even the wide latitude allowed in such addresses and charged, in substance, that the defendant maintained a school for perjury to instruct witnesses how to swear falsely in its interest.

A verdict should be found only on the law and the evidence. Appeals to prejudice or passion, and the statement of facts neither proved nor presumed, have no place in a trial conducted according to the rules of the common law. The statement in question was calculated to arouse prejudice and lead the jury away from the evidence. It was not warranted even if similar remarks had been made by the defendant's counsel, which is suggested but not shown by the record. It would have justified the trial court or the Appellate Division in exercising the great power of dealing with the facts, which is intrusted to them but not to us, by setting aside the verdict and granting a new trial. The Court of Appeals, however, can reverse

only on an exception taken to a ruling of the court, and no exception relating to the subject raises an error that we can review.

The plaintiff's counsel was permitted to finish his address without any objection. The court was not asked to take any action or make any ruling until after the charge had been delivered. The remedy of the defendant was to move promptly for directions to counsel to desist, and to the jury to disregard. As was said by the Supreme Court of the United States: "It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks and request its interposition, and, in case of refusal, to note an exception." (*Crumpton v. United States*, 138 U. S. 361, 364.)

The defendant's counsel, however, did not ask the court to interpose, or to tell the jury to pay no attention to the mischievous remark, but waited until after the charge, when he called attention to the subject for the first time by excepting to the language used by counsel in summing up. This was not the subject of an exception, for an exception can properly be taken only to a ruling of the court, or to a refusal to rule. The court should first be asked to rule in accordance with the law which the counsel deems adapted to the occasion, and in case of refusal an exception will lie. (*Dimon v. N. Y. C. & H. R. R. Co.*, 173 N. Y. 356, 358.)

Finally, however, the defendant's counsel moved to withdraw a juror on account of the improper observation, but the motion was denied and he excepted. This was not the proper remedy, for leave to withdraw a juror is a favor, not a right, and has always been held to rest within the sound discretion of the court. Matters of discretion are reviewable by the Appellate Division, but not by us. As was said by Judge EARL in a late case: "It is now claimed that the trial judge erred in permitting the case to go before the jury which had heard the objectionable remark. The remark was undoubtedly an improper one, but the refusal of the court to grant the defendant's motion (to withdraw a juror) was not a legal

N. Y. Rep.] Dissenting opinion, per PARKER, Ch. J.

error reviewable in this court. The motion was addressed entirely to the discretion of the court, which could grant or refuse it, taking into consideration the circumstances surrounding the case." (*Chesebrough v. Conover*, 140 N. Y. 382, 388.)

I find no error in the record that we have the power to correct, and hence the judgment appealed from should be affirmed, with costs.

CULLEN, J. I vote for the affirmance of this judgment. I do not take issue with the chief judge of the court in the proposition that a passenger who causes the danger by which he is injured cannot complain of the injury. It is necessary in the management of street cars that the brake from time to time should be operated and it requires room for the driver or motorman to use it. When a passenger takes his stand on the platform of a car I think he assumes, not the exceptional but the natural and usual risks of his position, such as the jolts and jars from which a car propelled, even over the best of tracks, is not entirely free. So, also, he should see that he keeps out of the way of the brake when it is necessary to apply it. If a passenger will insist in getting on the crowded platform of a car, so far as the position is dangerous from the presence of the crowd and the natural incidents of the operation of a car to which I have alluded, he takes the risk of those dangers, though not of exceptional ones. So, in this case, if the deceased had got on the front platform when it was so crowded that in the application of the brake in the ordinary manner it was likely to strike him, I should think he could not recover. But the evidence tends to show that when he was received as a passenger there was plenty of room on the platform and that he could have remained there safe from the injury which caused his death. If so, then the negligence of the defendant was in suffering the platform to subsequently become too crowded for safety.

PARKER, Ch. J. (dissenting). The defendant's evidence that plaintiff's intestate, Cattano, fell while attempting to step

off the car was contradicted by one of plaintiff's witnesses on cross-examination, who said that the brakeman "forced his way to put on the brake, and almost pushed me as well as pushing the young fellow off the other end." Considered with the rest of the testimony of this witness and the testimony of plaintiff's other witnesses, the conclusion might well be reached, I think, that the witness did not see Cattano pushed off, but inferred that he must have been, from the general situation and the result of it. The jury, however, had the right to give such value to his evidence as they deemed it worth, and we cannot say but they gave to it entire credit, and, therefore, must assume that they did.

Assuming the jury did give entire credit to this witness' testimony, we find that Cattano was pushed off the platform by the surging of others against him or by the force of the brakeman's arm as he applied the brake to check the car on a downward grade. There is no evidence that the brakeman did either more or less than his duty, or that what he did was done in an unusual way. This statement is quite sufficiently supported by the comment of the distinguished counsel for the plaintiff in summing up to the jury: "Who says the driver was seriously at fault? We haven't intimated that," and this he followed with a statement that there was fault in overcrowding the platform.

Well, if there were fault in overcrowding, did not Cattano contribute toward it? There were at the most eight men on the platform, and he furnished, therefore, one-eighth of the overcrowding. And he continued to furnish it after he had a chance to go in the car, according to the plaintiff's witness Peck, who stood beside and talked with Cattano on the front platform until the car reached Lexington avenue. He says: "I went into the car at Lexington avenue. I went into the car when people got off and made room on Lexington avenue. * * * People were going out of the car and the platform was being relieved. Then I went into the car. * * * I probably went in three or four feet. People crowded in after me. There were people between me and the door of the car

N. Y. Rep.] Dissenting opinion, per PARKER, Ch. J.

at the time." As Cattano stood beside Peck, he could have gone into the car and been one of those standing behind him, but he elected to stay where he was, swelling by one-eighth or one-sixth the crowd on the platform. And it is now contended that the law permits a jury to say that in doing so he was not guilty of negligence, but at the same time to say that the conductor — who does not appear from the evidence to have been on the platform prior to the accident — was guilty of negligence in permitting the platform to be crowded.

In other words, one who merely permitted overcrowding is negligent in not apprehending danger therefrom, while one who contributed his person to the overcrowding is free from negligence contributing to his own injury.

Such a result is clearly illogical and ought not to stand unless commanded by authority covering precisely such a state of facts.

In *Lehr v. Steinway & H. P. R. R. Co.* (118 N. Y. 556) the plaintiff was forced from a platform and injured and a recovery was sustained. But the facts were different from this case. The plaintiff entered the car and secured a seat for his wife, who was lame, and then retired to the rear platform, where, owing to the crowd, he was obliged to stand on one of the steps. Seeing that the front platform was less crowded he asked the conductor to stop the car so he might go to the front platform. Receiving no reply, he stepped from the rear platform at about the same time as the conductor and walked to the front platform, his disclosed purpose and his action not being objected to by either the conductor or driver. The front platform was so crowded that he did not fully accomplish his purpose, as he only succeeded in getting one foot on the platform, the other being on the step. So he clung with his right hand to the rail of the dash and with his left to the hand-rail at the end of the body of the car. A movement of the passengers broke the hold of his right hand, which he was unable to regain. Before he fell, however, he called upon the driver to stop the car, which was not done until after he had fallen and the car had passed over one of his legs. This court

said: "The evidence in respect to the speed of the car, and the circumstances under which the plaintiff attempted to enter on the front platform, would not have justified the court in ruling, as a matter of law, that the plaintiff contributed to his own injury by making the attempt."

A very different case from this, where, as we have seen, Cattano rode upon the front platform for a long time with full knowledge of the extent of the crowding, making no attempt to enter the car when the man standing next to him and others on the front platform did so.

In *Willis v. Long Island R. R. Co.* (34 N. Y. 670) the plaintiff, while riding upon a platform was injured by a collision, a danger which he had no reason to apprehend, and, therefore, it could not be said, as a matter of law, that he was careless in not guarding against it.

In *Graham v. Manhattan Ry. Co.* (149 N. Y. 336) while the plaintiff's injury would not have happened had not the platform been crowded, yet it would not have happened had not the defendant's employee had an altercation with a passenger and struck him, the effect of which was to cause a movement of the crowd upon the platform which tended to crowd the plaintiff from the train. In order to save himself he made a quick, involuntary movement with his left hand to grasp the railing behind him, and his arm was caught between the railing of the car upon which he was riding and those on the car immediately in the rear, as they came together in rounding a curve. And this court properly held the action of the employee in striking the passenger to be an element tending to render the question of contributory negligence one for the jury, inasmuch as he had a right to assume that the company's servants would cause no unusual disturbance of the crowd, and further that he had a right to assume that the company's cars were so constructed as not to render his position dangerous from their proximity to each other in passing over any portion of the road.

In *Nolan v. Brooklyn City & N. R. R. Co.* (87 N. Y. 63) the plaintiff while standing on the front platform of a street car

N. Y. Rep.] Dissenting opinion, per PARKER, Ch. J.

— no other person being on it except the driver — was thrown off because of the action of the driver in suddenly whipping one of the horses, which plunged under the blows, occasioning a jar which, coming without warning, threw him from the car. The testimony showed that the defendant was accustomed to allow men smoking to ride on the front platform, and plaintiff went there because he was smoking. The court necessarily held that the plaintiff was not guilty of contributory negligence as a matter of law in accepting and acting upon the custom of the defendant.

In *Ginna v. Second Ave. R. Co.* (67 N. Y. 596) the car was so crowded that plaintiff's intestate could not enter it without great discomfort and so he stood upon the platform with his back against the body of the car. The platform was not crowded, but a switch having been left open the car ran off upon it, producing a violent jolt, which threw the plaintiff's intestate and the other passengers who were standing on the platform off the car. The negligence of the defendant was conceded, and, of course, it was held that the question of contributory negligence was for the jury, who would not have been justified in holding that the plaintiff's intestate could have anticipated an open switch.

It will readily be seen that the authorities above referred to — and they are the leading ones brought to our attention — are all readily distinguishable from the one under consideration.

In this case the platform was crowded with men who, rather than wait for the next car, were taking their chances on a crowded car, as men do every day; and if it be negligent for a company to permit men to crowd upon a platform because some one may be hurt if the crowd surge for some cause, it is equally negligent on the part of the man who, in possession of his faculties, insists upon adding his person to an already overcrowded platform.

It is impracticable in our large cities to furnish seats for all persons in the street cars during what are known as "rush hours," and during those hours men insist upon riding

Dissenting opinion, per PARKER, Ch. J. [Vol. 173, N. Y. Rep.]

upon platforms in order to gain time, and in so doing they contribute something toward the risk of injury to some one, in case of the surging of the crowd from some one of the many causes that arise from time to time; and if one of the last to crowd himself on, obtaining an insecure and unsafe position, be injured, without any other fault on the part of the company than that it permitted a crowd on the platform — which is this case — then there should not be, it seems to me, a recovery by the man who insisted upon being a part of the crowd.

Whether there be overcrowding on a platform is a question of fact for the jury, but they are not to determine the legal effect of overcrowding; that is a question of law for the courts.

It has not been held so far that it is a negligent act on the part of a street railroad to permit passengers to ride on the front platforms of cars, or to allow as many of them to ride there as can get secure positions; and I think it should not be so held in view of the necessities of the case. But if my view should not obtain, then it follows it should be held, as matter of law, that to permit the platform and steps to be crowded constitutes negligence, leaving the jury in case of controversy on that point to determine whether it was crowded. And if the fact of overcrowding be conclusively established — as in this case — it must follow that the persons on the steps or on the outside of the crowd who are thrown off contribute, as matter of law, to the result, for they not only helped to create the overcrowded and dangerous condition, but in addition placed themselves in the most hazardous of all the positions on the platform.

The judgment should be reversed.

O'BRIEN and MARTIN, JJ. (and CULLEN, J., in memorandum) concur with VANN, J.; HAIGHT, J., concurs with PARKER, Ch. J.; GRAY, J., not sitting.

Judgment affirmed.

MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

WILLIAM S. PEARSALL, Individually and as Administrator of
SAMUEL J. PEARSALL, Deceased, et al., Appellants, v. JAMES
H. WESTCOTT et al., Respondents.

Pearsall v. Westcott, 57 App. Div. 630, affirmed.
(Argued November 26, 1902; decided December 16, 1902.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the third judicial department, entered Janu-
ary 28, 1901, affirming a judgment in favor of defendants
entered upon a decision of the court on trial at Special Term.

C. H. Sturges for appellants.

Edgar T. Brackett for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN,
CULLEN and WERNER, JJ.

JOSEPH HASBROUCK, Appellant, v. CHARLES F. EICHORN et al.,
Composing the Board of Trustees of the Village of Dobbs
Ferry, et al., Respondents.

Hasbrouck v. Eichorn, 60 App. Div. 631, affirmed.
(Argued November 26, 1902; decided December 16, 1902.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the second judicial department, entered
July 2, 1901, affirming a judgment in favor of defendants
entered upon a decision of the court on trial at Special
Term.

Hector M. Hitchings and *Melvin S. Palliser* for appellant.

Frank V. Millard for respondents.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN,
CULLEN and WERNER, JJ.

JENNIE ROBERTS, Appellant, *v.* GRAND LODGE OF THE ANCIENT
ORDER OF UNITED WORKMEN OF THE STATE OF NEW YORK,
Appellant, et al., Respondent.

Roberts v. Cohen, 60 App. Div. 259, affirmed.

(Submitted November 26, 1902; decided December 16, 1902.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the first judicial department, entered June
25, 1901, upon an order reversing a judgment in favor of
plaintiff entered upon a decision of the court on trial at
Special Term.

A. C. Harwick and *I. B. Ripin* for appellants.

Jacob W. Kahn for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN,
CULLEN and WERNER, JJ.

FRED ADEE, Appellant, *v.* NASSAU ELECTRIC RAILROAD COM-
PANY et al., Respondents.

Adee v. Nassau Electric R. R. Co., 65 App. Div. 529, affirmed.

(Argued December 1, 1902; decided December 16, 1902.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the second judicial department, entered
November 19, 1901, affirming a judgment in favor of defend-

ants entered upon a dismissal of the complaint by the court on trial at Special Term.

William J. Carr, Edward M. Grout and Paul Grout for appellant.

Augustus Van Wyck, Frank H. Platt and Charles W. Church, Jr., for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

ANDREW H. SMITH, Appellant, *v.* HORATIO R. WILCOX,
Respondent.

Smith v. Wilcox, 64 App. Div. 618, appeal dismissed.

(Argued December 1, 1902; decided December 16, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 8, 1901, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

H. C. M. Ingraham and Isaac N. Miller for appellant.

Herbert Green for respondent.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

MARY EAGAN et al., Infants, by MARTIN EAGAN, their Guardian ad Litem, et al., Respondents, *v.* SARAH M. SCULLY, Individually and as Executor of PATRICK SCULLY, Deceased, Appellant, Impleaded with Others.

Eagan v. Scully, 29 App. Div. 617, affirmed.

(Argued December 1, 1902; decided December 16, 1902.)

APPEAL from a judgment entered March 6, 1901, upon an order of the Appellate Division of the Supreme Court in the

third judicial department, affirming an interlocutory judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term.

Daniel Naylor, Jr., and *Edward C. Whitmyer* for appellant.

Robert J. Landon and *Michael Foley* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. VIOLA W. MYER, Respondent, v. ROBERT B. ADAM et al., as Grade Crossing Commissioners of the City of Buffalo, Appellants.

People ex rel. Myer v. Adam, 74 App. Div. 604, appeal dismissed. (Argued December 1, 1902; decided December 16, 1902.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 18, 1902, which reversed a determination of the grade crossing commissioners of the city of Buffalo that the relator's lands were not injured so as to entitle her to compensation under the Grade Crossing Act.

De Witt Clinton and *Spencer Clinton* for appellants.

Adolph Rebadow for respondent.

Appeal dismissed, with costs, on the ground that while certiorari was properly taken to review the action of the grade crossing commissioners, nevertheless the return presents only a question of fact that the Appellate Division has passed upon and their decision cannot be reviewed in this court; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Final Accounting of JOHN W. DWIGHT,
as Assignee of ALBERT B. FITCH and CHARLES D. ALDRICH,
Individually and as Composing the Firm of FITCH & ALDRICH.
JOHN W. DWIGHT, as Assignee, et al., Appellants; CHEMUNG
CANAL BANK et al., Respondents.

Matter of Dwight, 61 App. Div. 357, appeal dismissed.
(Argued December 12, 1902; decided December 16, 1902.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the third judicial department, entered
May 16, 1901, affirming a judgment of the Chemung County
Court settling the accounts of the petitioner under the pro-
visions of the General Assignment Act.

Judson A. Gibson and *Harry S. Thayer* for appellants.

Frederick Collin for respondents.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, VANN and CULLEN, JJ.

MARY E. REILLEY, Appellant, v. THE ALBANY COUNTY BANK,
Respondent.

McCarty v. Albany County Bank, 51 App. Div. 619, affirmed.
(Argued December 2, 1902; decided December 18, 1902.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the third judicial department, entered
June 13, 1900, affirming a judgment in favor of defendant
entered upon the report of a referee.

Worthington Frothingham for appellant.

Edwin Countryman and *Lansing Hotelling* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN,
CULLEN and WERNER, JJ.

NEW ENGLAND WATER WORKS COMPANY, Appellant, v. THE
FARMERS' LOAN AND TRUST COMPANY, Respondent.

New England Water Works Co. v. Farmers' L. & T. Co., 65 App. Div. 610, affirmed.

(Argued December 3, 1902; decided December 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 15, 1901, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

George H. Yeaman for appellant.

David McClure for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ. Absent : GRAY, J.

HIRAM L. BARKER, Respondent, v. GEORGE K. HIGBIE,
Appellant.

Barker v. Higbie, 59 App. Div. 627, affirmed.

(Submitted December 3, 1902; decided December 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 2, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the Monroe County Court on trial without a jury.

George E. Warner for appellant.

Hiram L. Barker, respondent, in person.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ. Absent : GRAY, J.

WILLIAM NORSWORTHY, Appellant, *v.* TROY AND NEW ENGLAND RAILWAY COMPANY, Respondent.

Norsworthy v. Troy & New England Ry. Co., 66 App. Div. 616, affirmed. (Argued December 5, 1902; decided December 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 15, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

H. Judd Ward for appellant.

James Farrell for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

THOMAS S. COOMBS, Respondent, *v.* THE CITY OF MOUNT VERNON, Appellant.

JESSE G. EDWARDS, Respondent, *v.* THE CITY OF MOUNT VERNON, Appellant.

Coombs v. City of Mount Vernon; Edwards v. City of Mount Vernon, 64 App. Div. 620, affirmed. (Submitted December 5, 1902; decided December 18, 1902.)

APPEALS from judgments of the Appellate Division of the Supreme Court in the second judicial department, entered November 9, 1901, affirming judgments in favor of plaintiffs entered upon verdicts directed by the court.

William J. Marshall for appellant.

George C. Appell for respondents.

Judgments affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ.

THE COLONIAL DAMES OF AMERICA, Appellant, *v.* THE COLONIAL DAMES OF THE STATE OF NEW YORK, Respondent.

THE COLONIAL DAMES OF AMERICA, Appellant, *v.* THE NATIONAL SOCIETY OF THE COLONIAL DAMES OF AMERICA et al., Respondents.

Colonial Dames of America v. Colonial Dames of the State of New York; Colonial Dames of America v. National Socy. of the Colonial Dames of America, 68 App. Div. 615, affirmed.

(Argued December 8, 1902; decided December 18, 1902.)

APPEALS from judgments of the Appellate Division of the Supreme Court in the first judicial department, entered July 17, 1901, affirming judgments in favor of the defendants entered upon dismissals of the complaints by the court on trial at Special Term.

Franklin Bartlett for appellant.

John M. Bowers, Charles F. Brown and Latham G. Reed for respondents.

Judgments affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ.

DAVID N. CARVALHO, Appellant, *v.* THE BROOKLYN AND JAMAICA BAY TURNPIKE COMPANY, Respondent.

Carvalho v. Brooklyn & J. B. Turnpike Co., 56 App. Div. 522, affirmed.
(Argued December 8, 1902; decided December 18, 1902.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 18, 1900, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

William J. Kelly for appellant.

Augustus Van Wyck and *Charles W. Church, Jr.*, for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ.

GEORGE F. BINDRIM et al., as Executors of MATHIAS BINDRIM, Deceased, Respondents, v. BARBARA ULLRICH et al., Defendants.

WILLIAM E. BINDRIM et al., Appellants.

Bindrim v. Ulrich, 64 App. Div. 444, appeal dismissed.

(Submitted December 15, 1902; decided December 18, 1902.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 21, 1901, affirming a judgment of Special Term construing the will of Mathias Bindrim, deceased.

The motion was made on the ground that the appeal had not been perfected by giving the security required by section 1326 of the Code of Civil Procedure.

John B. Quintin for motion.

Russell Benedict opposed.

Motion granted and appeal dismissed, without costs of appeal, but with ten dollars costs of motion.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM S. DEVERY, Appellant, v. BIRD S. COLER, as Comptroller of the City of New York, Respondent.

People ex rel. Devery v. Coler, 72 App. Div. 615, affirmed.

(Submitted November 12, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May

20, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to pay to the relator the salary of chief of police of the city of New York for the months of March, April and May, 1901.

Judson S. Landon, Abram I. Elkus and Carlisle J. Gleason for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly of counsel), for respondent.

Order affirmed on authority of *People ex rel., Devery v. Coler* (173 N. Y. 103), with disbursements, but without costs.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM S. DEVERY, Appellant, v. MICHAEL C. MURPHY, as Police Commissioner of the City of New York, Respondent.

People ex rel. Devery v. Murphy, 72 App. Div. 615, affirmed.
(Submitted November 12, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 20, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to certify on the payroll of the police department of the city of New York that defendant is entitled to the salary of chief of police for the months of February to August, 1901, inclusive.

Judson S. Landon, Abram I. Elkus and Carlisle J. Gleason for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for respondent.

Order affirmed on authority of *People ex rel. Devery v. Coler* (173 N. Y. 103), with disbursements, but without costs.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN JJ. Absent: VANN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM S. DEVERY, Appellant, v. CHARLES H. KNOX et al., Constituting the Civil Service Commission of the City of New York, Respondents.

People ex rel. Devery v. Knox, 72 App. Div. 615, affirmed.
(Submitted November 12, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 20, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendants to certify upon the payroll of the police department of the city of New York that the relator is entitled to the salary of chief of police for the months of February to August, 1901, inclusive.

Judson S. Landon, Abram I. Elkus and Carlisle J. Gleason for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for respondent.

Order affirmed on authority of *People ex rel. Devery v. Coler* (173 N. Y. 103), with disbursements, but without costs.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY E. ABELL, Appellant, v. BIRD S. COLER, as Comptroller of the City of New York, Respondent.

People ex rel. Abell v. Coler, 72 App. Div. 615, affirmed.
(Argued November 12, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 20, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to pay to the relator the salary of police commis-

sioner of the city of New York for the period from February 22, 1901, to March 31, 1901.

Judson S. Landon, Abram I. Elkus and Carlisle J. Gleason for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly of counsel), for respondent.

Order affirmed on authority of *People ex rel. Devery v. Coler* (173 N. Y. 103), with disbursements, but without costs.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

MICHAEL ROSA, Appellant, v. BERTHA VOLKENING et al.,
Respondents.

Rosa v. Volkening, 64 App. Div. 426, affirmed.
(Argued December 9, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 23, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

Franklin Pierce for appellant.

A. T. Payne for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT and CULLEN, JJ. Not voting: BARTLETT and VANN, JJ.

WILBERT S. BIRDSALL, Appellant, v. JOHN P. WHEELER et al., Respondents.

Birdsall v. Wheeler, 62 App. Div. 625, affirmed.
(Argued December 9, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered

September 5, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Robert S. Parsons for appellant.

A. D. Wales for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ.

OCTAVIUS O. COTTLE et al., Appellants, v. THE COUNTY OF ERIE et al., Respondents.

Cottle v. County of Erie, 57 App. Div. 443, affirmed.
(Argued December 10, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 20, 1901, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and granting a new trial.

Edmund P. Cottle for appellants.

Percy S. Lansdowne, *Harry N. Kraft*, *Charles Diebold, Jr.*, and *John W. Fisher* for respondents.

Order affirmed and judgment absolute ordered against plaintiffs on the stipulation, with costs in all courts, upon the ground that there was a question of fact in relation to occupancy and an error of law in relation to the method adopted by the plaintiff to prove occupancy; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, VANN and CULLEN, JJ. Dissenting: O'BRIEN, J.

ARTHUR J. SLADE, Appellant, v. FRANK BOUTIN, JR., Respondent, Impleaded with Others.

Slade v. Boutin, 68 App. Div. 537, affirmed.
(Argued December 10, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 4, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

John S. Seymour, Frederick Seymour and Eugene M. Harmon for appellant.

John C. Hubbell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ.

HENRY E. H. BRERETON, Appellant, v. LAURA E. GILMORE, Respondent.

Brereton v. Gilmore, 66 App. Div. 616, affirmed.
(Submitted December 10, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 15, 1901, affirming a judgment in favor of plaintiff entered upon the report of a referee.

T. W. McArthur for appellant.

Charles R. Patterson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ.

RICHARD F. OLPHERTS, Appellant, v. FRANK SULLIVAN SMITH,
Respondent.

Olpherts v. Smith, 54 App. Div. 514, affirmed.
(Argued December 11, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 10, 1900, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

Wayland E. Benjamin for appellant.

Frederic W. Frost and *C. Walter Artz* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, VANN and CULLEN, JJ.

WILLIAM W. PRENTICE, Respondent, v. PALMER C. FARGO,
Appellant.

Prentice v. Fargo, 53 App. Div. 608, affirmed.
(Argued December 11, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 3, 1900, reversing a judgment in favor of defendant entered upon a verdict and granting a new trial.

Fletcher C. Peck for appellant.

E. E. Charles for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, VANN and CULLEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
FRANKFORT O. VANDERVOORT, Appellant.

People v. Vandervoort, 57 App. Div. 635, affirmed.
(Argued December 12, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 17, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Watson M. Rogers for appellant.

B. A. Field for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, VANN and CULLEN, JJ. Not voting: O'BRIEN, J.

THE BUFFALO NATURAL GAS FUEL COMPANY, Respondent, *v.*
THE BARBER ASPHALT PAVING COMPANY, Appellant.

Buffalo Natural Gas Fuel Co. v. Barber Asphalt Paving Co., 54 App. Div. 629, affirmed.
(Argued December 16, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 15, 1900, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Irving Lester Fisk for appellant.

J. H. Metcalf for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN and BARTLETT, JJ. Not sitting: HAIGHT, J. Taking no part: CULLEN and WERNER, JJ.

JOHN J. HURLEY et al., Appellants, v. HENRY BROWN,
Respondent.

Hurley v. Brown, 54 App. Div. 619, appeal dismissed.
(Submitted December 16, 1902; decided January 6, 1903.)

APPEAL from a judgment, entered October 16, 1900, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Morris & Whitehouse for appellants.

Horace Graves and *George A. Seaman* for respondent.

Appeal dismissed, without costs, on stipulation.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT and
HAIGHT, JJ. Absent: CULLEN and WERNER, JJ.

In the Matter of the Claim of WILLIAM W. BISSELL, Appellant, v. THE VILLAGE OF LARCHMONT, Respondent, for Damages from Change of Grade of Addison Avenue.

Matter of Bissell, 57 App. Div. 61, appeal dismissed.
(Argued December 16, 1902; decided January 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 26, 1901, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

J. Addison Young for appellant.

Alfred Opdyke and *Carsten Wendt* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT and
HAIGHT, JJ. Absent: CULLEN and WERNER, JJ.

JOHN G. D'AMATO, Appellant, *v.* EUGENIO GENTILE,
Respondent.

D'Amato v. Gentile, 54 App. Div. 625, affirmed.
(Submitted December 16, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 16, 1900, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

Robert H. Roy and *J. Herbert Watson* for appellant.

Richard A. Rendich for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ. Absent: CULLEN and WERNER, JJ.

JOHN PETRIE, Respondent, *v.* ISAAC N. MILLER, Appellant.

Petrie v. Miller, 57 App. Div. 17, affirmed.
(Argued December 17, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 19, 1901, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

Arthur Furber for appellant.

John L. Hill and *Adolph Vanrein* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ. Absent: CULLEN and WERNER, JJ.

THE TOWN OF GOSHEN, Respondent, v. THEODORE SMITH et al.,
Appellants.

Town of Goshen v. Smith, 61 App. Div. 461, affirmed.
(Argued December 17, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 6, 1901, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

Henry Bacon for appellants.

M. N. Kane for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ. Absent: CULLEN and WERNER, JJ.

GEORGE M. SWEZEY, as Sheriff of Wayne County, Appel-
lant, v. CORNELIA LEGG, Respondent.

Swezey v. Legg, 39 App. Div. 655, affirmed.
(Argued December 17, 1902; decided January 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 13, 1899, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

William Roe for appellant.

De Lancey Stow for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ. Absent: CULLEN and WERNER, JJ.

ALBERT M. CARD, Respondent, *v.* JOHN A. MOORE et al.,
Appellants.

Card v. Moore, 68 App. Div. 327, affirmed.
(Argued December 18, 1902; decided January 6, 1903.)

APPEAL from a judgment, entered July 30, 1902, upon an order of the Appellate Division of the Supreme Court in the second judicial department, affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Louis S. Philips and *Richard F. Goldsborough* for appellants.

Theodore F. Hamilton and *Edward Stetson Griffing* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ. Absent: CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
MORTIMER BURNS, Appellant.

People v. Burns, 78 App. Div. 611, affirmed.
(Argued October 30, 1902; decided January 13, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 10, 1902, which affirmed a judgment of the Cayuga County Court rendered upon a verdict convicting the defendant of the crime of rape in the first degree.

Robert L. Drummond for appellant.

Harry T. Dayton, District Attorney, for respondent.

Judgment of conviction affirmed; no opinion.

CONCUR: GRAY, O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* JOHN BREMER, Respondent.

People v. Bremer, 66 App. Div. 14, appeal dismissed.

(Argued January 7, 1903; decided January 13, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 19, 1902, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial.

Francis K. Sweetser, *Samuel S. Slater* and *Ellis L. Aldrich* for appellant.

Herbert R. Limburger and *Maurice Meyer* for respondent.

Appeal dismissed, with costs; no opinion.

Concur.: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

AMELIA WEBER, Respondent, *v.* THE SUPREME TENT OF THE KNIGHTS OF THE MACCABEES OF THE WORLD, Appellant.

(Submitted January 5, 1903; decided January 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See 172 N. Y. 490.)

THE PEOPLE OF THE STATE OF NEW YORK ex rel. VIOLA W. MYER, Respondent, *v.* ROBERT B. ADAM et al., as Grade Crossing Commissioners of the City of Buffalo, Appellants.

(Submitted January 5, 1903; decided January 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See 173 N. Y. 582.)

WILLIAM W. WEIGLEY, Respondent, *v.* SYLVESTER H. KNEELAND, Appellant.

(Submitted December 18, 1902; decided January 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See 172 N. Y. 625.)

In the Matter of the Opening of Ludlow Street in the City of
Yonkers.

JAMES B. LUDLOW et al., as Executors of THOMAS W. LUDLOW,
Deceased, Appellants; THE NEW YORK CENTRAL AND HUD-
SON RIVER RAILROAD COMPANY, Respondent.

(Submitted January 5, 1903; decided January 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See
172 N. Y. 542.)

PETRO FAVO, Appellant, v. REMINGTON ARMS COMPANY,
Respondent.

Favo v. Remington Arms Co., 67 App. Div. 414, appeal dismissed.
(Argued January 5, 1903; decided January 13, 1903.)

MOTION to dismiss an appeal from an order of the Appellate
Division of the Supreme Court in the third judicial depart-
ment, entered February 3, 1902, reversing a judgment in
favor of plaintiff entered upon a verdict and order denying a
motion for a new trial and granting a new trial.

The motion was made upon the ground that the Court of
Appeals had no jurisdiction to entertain the appeal.

Amasa J. Parker, Jr., for motion.

Andrew Colvin opposed.

Motion granted and appeal dismissed, with costs accrued in
this court and ten dollars costs of motion

In the Matter of the Accounting of WILLIAM B. DAVENPORT,
as Administrator of ELIZA T. WHITE, Deceased, Respondent.
JOSIAH J. WHITE, Individually and as General Guardian of
FREDERIC HALL WHITE, an Infant, Appellant.

Matter of Davenport, 74 App. Div. 624, appeal dismissed.
(Argued January 5, 1903; decided January 13, 1903.)

MOTION to dismiss an appeal from an order of the Appel-
late Division of the Supreme Court in the second judicial
department, entered June 13, 1902, which affirmed an order

of the Kings County Surrogate's Court vacating the report of a referee to whom the account herein had been referred and remanding the same to said referee for a further hearing.

The motion was made upon the grounds that the appellant had failed to serve the papers required by the rules of the Court of Appeals and that said court had no power to entertain the appeal.

George S. Ingraham for motion.

Josiah J. White, in person, opposed.

Motion granted and appeal dismissed, with costs accrued in this court and ten dollars costs of motion.

RUDOLPH H. EVANS, Respondent, *v.* CHARLES F. MULLER et al., Respondents, and DAVID KEANE et al., Appellants.

Evans v. Muller, 74 App. Div. 680, appeal dismissed.

(Argued January 5, 1903; decided January 13, 1903.)

MOTION to disniss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 24, 1902, which affirmed an order of Special Term discontinuing the action.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

Wolcott G. Lane for motion.

J. Noble Hayes opposed.

Motion granted and appeal dismissed, with costs accrued in this court and ten dollars costs of motion.

AMERICAN PRESS ASSOCIATION, Respondent, *v.* MAY THORNE BRANTINGHAM, Respondent, and WESTCHESTER TRUST COMPANY, Appellant.

Reported below, 75 App. Div. 435.

(Argued January 5, 1903; decided January 13, 1903.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial

department, entered November 19, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the affirmance by the Appellate Division was unanimous, and a question of fact only was involved.

Alex Thain for motion.

Joseph J. Cunningham opposed.

Motion denied, without costs.

HUTCHINSON SOUTHGATE, as Trustee under the Will of CHARLES L. R. HUTCHINSON, Deceased, Appellant, v. THE CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK et al., Respondents, and RENEE C. SOUTHGATE et al., Appellants and Respondents.

Southgate v. Continental Trust Co., 74 App. Div., 150, appeal dismissed. (Submitted January 5, 1908; decided January 18, 1908.)

MOTION to dismiss appeals of defendants Renee C. Southgate and others from a judgment of the Appellate Division of the Supreme Court in the first judicial department, which modified, and affirmed as modified, a judgment of Special Term construing the last will and testament of Charles L. R. Hutchinson, deceased.

The motion was made upon the ground that the said appellants had failed to perfect their appeal by filing the undertaking required by section 1326 of the Code of Civil Procedure.

Oliver J. Wells for motion.

No one opposed.

Motion granted and appeal dismissed, with costs against said defendants.

NELLIE A. G. VOUGHT, Appellant, *v.* EASTERN BUILDING AND
LOAN ASSOCIATION OF SYRACUSE, Respondent.

(Submitted January 5, 1903; decided January 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See
172 N. Y. 508.)

FRANCES C. SCHUYLER, as Administratrix of FRED C. SCHUYLER,
Deceased, Respondent, *v.* THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Appellant.

Reported below, 68 App. Div. 650.

(Argued January 5, 1903; decided January 13, 1903.)

MOTION to withdraw appeal from an order of the Appellate
Division of the Supreme Court in the fourth judicial depart-
ment, entered January 17, 1902, reversing a judgment in favor
of defendant entered upon a verdict directed by the court and
an order denying a motion for a new trial and granting a new
trial.

M. C. Spratt for motion.

John J. Ryan opposed.

Motion denied, with ten dollars costs, but without prejudice
to a renewal upon additional papers.

In the Matter of the Application of the SCHENECTADY RAIL-
WAY COMPANY, Respondent, for the Appointment of Com-
missioners to Determine Whether its Railroad Ought to be
Constructed and Operated in Washington Avenue in the
City of Schenectady.

CAROLINE PAIGE LANSING, Appellant.

Matter of Schenectady Ry. Co., 67 App. Div. 628, affirmed.

(Argued November 13, 1902; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the third judicial department, entered

February 15, 1902, which confirmed the report of commissioners appointed under section 94 of the Railroad Act.

Edward Winslow Paige for appellant.

Marcus T. Hun, James A. Van Voast, Learned Hand and *James O. Carr* for respondent.

Order affirmed, with costs ; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and CULLEN, JJ. Absent: VANN, J.

THOMAS J. NOLAN, Appellant, v. METROPOLITAN STREET RAILWAY COMPANY, Respondent.

Nolan v. Metropolitan St. Ry. Co., 65 App. Div. 184, affirmed. (Argued December 18, 1902; decided January 20, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 27, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

Thomas P. Wickes and *Charles R. La Rue* for appellant.

Charles F. Brown and *Henry A. Robinson* for respondent.

Judgment affirmed, with costs ; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ. Absent: CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DAVID STEVENSON BREWING COMPANY, Appellant, v. PATRICK W. CULLINAN, as State Commissioner of Excise, Respondent.

People ex rel. Stevenson Co. v. Lyman, 69 App. Div. 406, affirmed. (Argued January 5, 1903; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made March

7, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to pay a rebate alleged to be due upon a surrendered liquor tax certificate issued to Harry Barry and by him assigned to relator.

William G. McCrea for appellant.

S. B. Mead for respondent.

Order affirmed, with costs, on opinion of VAN BRUNT, P. J., below.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DAVID STEVENSON BREWING COMPANY, Appellant, v. PATRICK W. CULLINAN, State Commissioner of Excise, Respondent.

People ex rel. Stevenson Co. v. Lyman, 67 App. Div. 446, affirmed.
(Argued January 5, 1908; decided January 20, 1908.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made January 10, 1902, which affirmed an order of Special Term dismissing an alternative writ of mandamus to compel the defendant to pay a rebate alleged to be due upon a surrendered liquor tax certificate issued to John Michels and by him assigned to relator.

William G. McCrea for appellant.

S. B. Mead and *Nevada N. Stranahan* for respondent.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES D. CLIFFORD, Appellant, v. JOHN J. SCANNELL, Fire Commissioner of the City of New York, Respondent.

People ex rel. Clifford v. Scannell, 74 App. Div. 406, affirmed.
(Argued January 5, 1903; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 19, 1902, which dismissed a writ of certiorari to review the proceedings of the defendant in dismissing the relator from the fire department of the city of New York and confirmed such proceedings.

Nathaniel A. Elsberg for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly of counsel), for respondent.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TUPPER LAKE WATER COMPANY, Appellant, v. CHARLES H. SISSON et al., as Town Auditors of the Town of Altamont, Respondents.

People ex rel. Tupper Lake W. Co. v. Sisson, 75 App. Div. 138, affirmed.
(Argued January 6, 1903; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 16, 1902, which confirmed a determination of the defendants rejecting a claim of the relator for water furnished to the town of Altamont.

John P. Badger for appellant.

John P. Kellas for respondents.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARGARET MURPHY, Appellant, v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et al., Respondents.

People ex rel. Murphy v. Bd. Education, 76 App. Div. 620, affirmed.
(Submitted January 6, 1903; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 12, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendants to increase the salary of the relator as a teacher in the public schools of the city of New York.

Frank M. Hardenbrook for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly and William B. Crowell of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

HORACE T. ROWLEY, Respondent, v. RACHEL FELDMAN et al., Defendants.

THOMAS F. BALDWIN, Appellant.

Rowley v. Feldman, 74 App. Div. 492, affirmed.
(Argued January 6, 1903; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered August 4, 1902, which modified and affirmed as modified an order of Special Term fixing the amount to be paid by appellant herein as a defaulting purchaser at a foreclosure sale.

Charles C. Sanders and John Vincent for appellant.

John Ewen for respondent.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

In the Matter of the Application of JOHN J. STEWART, Appellant, for a Peremptory Writ of Mandamus against FRANCIS G. WARD, as Commissioner of Public Works of the City of Buffalo, et al., Respondents.

Matter of Stewart, 77 App. Div. 688, affirmed.
(Argued January 8, 1903; decided January 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 5, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant commissioner to appoint the petitioner to a position as assistant superintendent of streets of the city of Buffalo.

Simon Fleischmann for appellant.

W. H. Cuddeback for respondents.

Order affirmed, without costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and VANN, JJ. Not voting: CULLEN, J.

MAICHO FORTUNATO, Plaintiff, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, et al., Respondents, and HELEN A. DAWSON, as Administratrix of JOHN F. DAWSON, Deceased, et al., Appellants.

Fortunato v. Mayor, etc., of New York, 74 App. Div. 441, modified.
(Argued January 8, 1903; decided January 20, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 2, 1902, affirming a judgment in favor of respondents herein entered upon the report of a referee.

Charles E. Patterson, *C. J. G. Hall* and *Charles W. Dayton* for appellants.

George L. Rives, Corporation Counsel (*Theodore Connolly* of counsel), for city of New York, respondent.

Robert E. Deyo for executors of Thomas Patten, deceased, respondent.

Per Curiam. Judgment modified by awarding to the executors of Thomas Patten, deceased, only the amount demanded by them in their supplemental answer, to wit, \$5,000, with interest on \$3,500 from October 9, 1887, to March 22, 1901; on \$1,500 from August 23, 1888, to the date of the referee's report; and on \$2,500 from August 10, 1887, to August 23, 1888, and by inserting in said judgment the amount of such principal and interest in lieu of the amount found by Referee Townley, and interest thereon. And the judgment as thus modified is in all things affirmed, without costs as between the executors of Thomas Patten, deceased, and the Twelfth Ward Bank, but with costs to the mayor, etc., of the city of New York.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ., concur.

Judgment accordingly.

AGNES E. BURNS, Appellant, v. CHARLES GOLDEN MULLIN et al., Respondents.

Reported below, 42 App. Div. 118.

(Argued January 5, 1908; decided January 20, 1908.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 7, 1899, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

John G. Boyd for motion.

Lyman H. Bevins opposed.

Motion denied, with ten dollars costs.

In the Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, Respondent, for an Order Canceling Liquor Tax Certificate No. 7,606, Issued to MAX MICHA, Appellant.

Matter of Cullinan, 76 App. Div. 362, affirmed.

(Argued January 7, 1903; decided January 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 19, 1902, which affirmed an order of Special Term revoking and canceling a liquor tax certificate.

Uriah W. Tompkins and *C. J. G. Hall* for appellant.

Herbert H. Kellogg and *William E. Schenck* for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM A. HART, Appellant, v. BERNARD J. YORK et al., Composing the Board of Police Commissioners of New York City, Respondents.

People ex rel. Hart v. York, 73 App. Div. 445, affirmed.

(Submitted January 7, 1903; decided January 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 18, 1902, which dismissed a writ of certiorari to review the proceedings of the defendants in dismissing the relator from the police force of the city of New York and affirmed such proceedings.

Louis J. Grant for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* of counsel), for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN SHERIDAN, Appellant, v. RICHARD H. ADAMS et al., Composing the Board of Education of the City of New York, Respondents.

People ex rel. Sheridan v. Adams, 76 App. Div. 619, affirmed.
(Argued January 7, 1903; decided January 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made November 7, 1902, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendants to reinstate the relator in the position of inspector of buildings in the department of education of the city of New York.

A. S. Gilbert for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* and *William B. Crowell* of counsel), for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

JOHN HAVEN et al., Appellants, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

Haven v. Mayor, etc., of N. Y., 67 App. Div. 90, affirmed.
(Argued January 7, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 14, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

Joel J. Squier and *James A. Deering* for appellants.

George L. Rives, Corporation Counsel (*Theodore Connolly* and *George L. Sterling* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

MAGGIE A. COLEMAN et al., Appellants, v. THE CITY OF NEW YORK, Respondent.

Coleman v. City of New York, 70 App. Div. 218, affirmed.
(Argued January 7, 1903; decided January 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 3, 1902, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and granting a new trial.

Louis O. Van Doren for appellants.

George L. Rives, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for respondent.

Order affirmed and judgment absolute ordered for defendant upon the stipulation, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

CHARLES E. GRIFFITH, Respondent, v. THE CITY OF NEW YORK, Appellant.

Griffith v. City of New York, 73 App. Div. 549, affirmed.
(Argued January 8, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 18, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

George L. Rives, Corporation Counsel (James McKeen of counsel), for appellant.

James Burke, Jr., for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and VANN, JJ. Dissenting: CULLEN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
HENRY G. WISE, Appellant.

People v. Wise, 68 App. Div. 650, affirmed.
(Argued January 8, 1903; decided January 27, 1903.)

APPEAL from a judgment, entered January 20, 1902, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment in favor of plaintiff upon the verdict.

J. Rosecrans for appellant.

Burt L. Rich for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN and CULLEN, JJ. Not voting: O'BRIEN, J.

LOTTA HOPPER, Respondent, *v.* FRANK O. BROWN et al., as
Executors of CAROLINE S. SHEERWOOD, Deceased, Appellants.

Hopper v. Brown, 87 App. Div. 620, affirmed.
(Argued January 9, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Thomas Abbott McKennell for appellants.

Hamilton R. Squier for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and CULLEN, JJ.

KATHERINE N. SMITH et al., Appellants, v. FRANK RUGGIERO,
Respondent.

Smith v. Ruggiero, 52 App. Div. 882, affirmed.
(Argued January 12, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 6, 1900, affirming a judgment in favor of defendant entered upon the report of a referee.

Frederick H. Kellogg for appellants.

Lorenzo Ulo for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

LUZERNE A. WILD, as Executor of ALLEN WILD, Deceased,
Appellant, v. WILLIAM C. PORTER, Sheriff of Delaware
County, Respondent.

Wild v. Porter, 59 App. Div. 350, affirmed.
(Argued January 12, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 14, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Andrew G. Washbon for appellant.

James R. Baumes for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

CAROLINE QUADE, Appellant, v. PETER BERTSCH, Individually and as Executor and Trustee under the Will of WILLIAM BROISTEDT, Deceased, et al., Respondents.

Quade v. Bertsch, 65 App. Div. 600, affirmed.
(Argued January 12, 1903; decided January 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 11, 1901, which affirmed a judgment of Special Term construing the will of William Broistedt, deceased.

James Moffett for appellant.

George S. Espencheid, S. M. & D. E. Meeker, Louis Ehrenberg and Thomas H. Troy for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

In the Matter of the Accounting of J. DARWIN CHASE, Respondent, as Administrator of the Estate of PHILIP CHASE, Deceased.

HARPER CHASE, Appellant.

Matter of Chase, 70 App. Div. 623, affirmed.
(Argued January 12, 1903; decided January 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 18, 1902, which affirmed a decree of the Monroe County Surrogate's Court settling the accounts of J. Darwin Chase, as administrator of the estate of Philip Chase, deceased.

George P. Decker for appellant.

William H. Tompkins for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

CATHERINE LONERGAN et al., as Administrators of the Estate of WILLIAM J. LONERGAN, Deceased, Appellants, v. ERIE RAILROAD COMPANY, Respondent.

Loneragan v. Erie R. R. Co., 87 App. Div. 297, affirmed.
(Argued January 15, 1903; decided January 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 7, 1901, which reversed a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial and granted a new trial.

John Laughlin and *George W. Gillette* for appellants.

Adelbert Moot for respondent.

Per Curiam. The order appealed from should be affirmed, as the undisputed evidence establishes the contributory negligence of the plaintiffs' intestate, and judgment absolute should be entered in favor of the defendant and against the plaintiffs, with costs, according to stipulation.

GRAY, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur; PARKER, Ch. J., and WERNER, J., dissent.

Order affirmed, etc. _____

CORDELIA D. CHAUVET et al., Appellants and Respondents, v. MARGARET SEAMAN IVES, Respondent and Appellant.

(Submitted January 19, 1903; decided January 27, 1903.)

Motion for reargument denied, with ten dollars costs. (See 173 N. Y. 192.)

CHARLES A. HESS, as Assignee of SOL SAYLES, Respondent, v. W. & J. SLOANE, Appellant.

Hess v. Sloane, 66 App. Div. 522, affirmed.
(Argued January 13, 1903; decided January 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered Decem-

ber 11, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Selden Bacon for appellant.

Louis Marshall and *M. G. Holstein* for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

MARIE JANDA, as Administratrix of the Estate of FRANK JANDA, Deceased, Respondent, *v.* BOHEMIAN ROMAN CATHOLIC FIRST CENTRAL UNION OF THE UNITED STATES OF AMERICA, Appellant.

Janda v. Bohemian Roman Catholic Union, 71 App. Div. 150, affirmed. (Argued January 18, 1908; decided January 30, 1908.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 16, 1902, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Howard E. White and *Edward R. Otheman* for appellant.

Paul Jones and *Francis J. Nekarda* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

ELLEN KENNEDY, an Infant, by her Guardian ad Litem, JAMES KENNEDY, Respondent, *v.* CITY OF WATERVLIET, Appellant.

Kennedy v. City of Waterliet, 86 App. Div. 616, affirmed. (Argued January 18, 1908; decided January 30, 1908.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered

November 15, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

S. W. Russell, Jr., for appellant.

Thomas F. Powers and *L. E. Griffith* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

NORMAN Y. BRINTNALL, Respondent, *v.* SAMUEL M. RICE, Appellant.

Brintnall v. Rice, 63 App. Div. 54, affirmed.

(Argued January 14, 1903; decided January 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 3, 1900, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

P. Lewis Anderson and *Edward A. Alexander* for appellant.

Albert W. Venino for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

HERMANN H. CAMMANN et al., as Surviving Executors of NATHANIEL P. BAILEY, Deceased, Appellants, *v.* ALLETTA R. BAILEY, Defendant, SIDNEY SMITH WHITTLESEY et al., Respondents, and ALLETTA NATHALIE BAILEY, Appellant, Impleaded with Others.

Cammann v. Whittlesey, 70 App. Div. 598, affirmed.

(Argued January 15, 1903; decided January 30, 1903.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

May 2, 1902, which modified and affirmed as modified a judgment construing the will of Nathaniel P. Bailey entered upon the report of a referee.

Fordham Morris for plaintiffs, appellants.

Stephen H. Olin for defendant, appellant.

Thomas F. Conway for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, VANN and WERNER, JJ. Dissenting: GRAY, J. Absent: MARTIN, J.

JOHN J. PHELAN, as Receiver of the AMERICAN FUR COMPANY, Respondent, *v.* J. MURRAY DOWNS, Individually and as Referee, et al., Appellants.

Phelan v. Downs, 59 App. Div. 282, affirmed.

(Argued January 16, 1903; decided January 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 30, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

J. Newton Fiero for appellants.

Lewis E. Carr for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

ANNIE E. O'SULLIVAN, as Administratrix of the Estate of DENIS O'SULLIVAN, Deceased, Appellant, *v.* JOSEPH A. FLYNN, Respondent.

O'Sullivan v. Flynn, 67 App. Div. 516, appeal dismissed.

(Argued January 28, 1903; decided January 30, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

February 5, 1902, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial.

Denis O'Sullivan for appellant.

Carl Schurz Petrasch and *Alvin C. Cass* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

FREDERIC W. RHINELANDER, Appellant, *v.* THE FARMERS' LOAN AND TRUST COMPANY, Respondent.

BENJAMIN W. FLEISHER, Appellant, *v.* THE FARMERS' LOAN AND TRUST COMPANY, Respondent.

(Submitted January 26, 1903; decided January 30, 1903.)

Motion for reargument denied, with ten dollars costs.
(See 172 N. Y. 519.)

In the Matter of the Probate of the Will of FREDERICK AKERS, Deceased.

GEORGE H. JEFFERIES, Appellant; JAMES P. NIEMAN et al., Respondents.

Matter of Akers, 74 App. Div. 461, affirmed.

(Argued January 5, 1903; decided February 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 15, 1902, which affirmed a decree of the New York County Surrogate's Court admitting to probate the will of Frederick Akers, deceased.

J. Aspinwall Hodge and *L. Lafayette Fawcett* for appellant.

John Vincent and *J. Mayhew Wainwright* for respondents.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, MARTIN, VANN and CULLEN, JJ. Dissenting: O'BRIEN and HAIGHT, JJ.

ELLEN NOONAN RALLEY, Respondent, *v.* MICHAEL P. O'CONNOR, as Executor of LUIS F. SASS, Deceased, Appellant.

Ralley v. O'Connor, 71 App. Div. 828, affirmed.
(Argued January 14, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 5, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

M. P. O'Connor, *Robert P. Harlow* and *James J. Allen* for appellant.

John C. Gulick for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ.

JOHN A. STEWART et al., as Trustees under the Will of ISAAC N. PHELPS, Deceased, Respondents, *v.* ANNA FRANCES PHELPS et al., Respondents, and HELEN LOUISA PHELPS STOKES, Appellant, Impleaded with Others.

Stewart v. Phelps, 71 App. Div. 91, affirmed.
(Argued January 14, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 15, 1902, which affirmed a judgment construing the will of Isaac N. Phelps, deceased, entered upon the report of a referee.

Cephas Brainerd and *Hamilton Wallis* for appellant.

Edward W. Sheldon for plaintiffs, respondents.

J. Edwards Wyckoff for defendants, respondents.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., HAIGHT, MARTIN and WERNER, JJ.
Not voting: GRAY and VANN, JJ. Taking no part: BARTLETT, J.

JACOB FRITZ et al., Appellants, *v.* THE CITY TRUST COMPANY OF NEW YORK, as Trustee under the Will of ELIZA EISNER, Deceased, Respondent.

Fritz v. City Trust Co., 72 App. Div. 532, affirmed.
(Argued January 19, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 10, 1902, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Nathan Ottinger for appellants.

Jerome Eisner for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, CULLEN and WERNER, JJ. Dissenting: HAIGHT and MARTIN, JJ. Absent: VANN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant and Respondent, *v.* JACOB BOOTMAN et al., Respondents and Appellants.

People v. Bootman, 72 App. Div. 619, 620, affirmed.
(Argued January 19, 1903; decided February 10, 1903.)

CROSS-APPEALS, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 28, 1902, which affirmed an interlocutory judgment of Special Term sustaining in part and overruling in part a demurrer to the complaint. The following are the questions certified:

"*First.* Do counts I to XIII, both inclusive, of the amended complaint state facts sufficient to constitute a cause of action?

"*Second.* Is the plaintiff entitled to maintain a civil action for the recovery of penalties under section 39 of the Forest,

Fish and Game Law, constituting Chapter 31 of the General Laws of the State of New York, for a violation of any of the provisions of Article II of said Act?

"*Third.* Is the amended complaint defective because it is not therein alleged that the various birds for the possession of which the defendants are sought to be charged with penalties were taken or killed within the boundaries of the State of New York?

"*Fourth.* Are facts sufficient to constitute a cause of action stated in counts numbered from XIV to XIX, both inclusive, of the amended complaint, or in either of said counts?

"*Fifth.* Can the defendants be made liable in this action under Section 33 of the Forest, Fish and Game Law, as amended by Chapter 91 of the Laws of 1901, and Section 39 of said Act, by reason of the possession by them as alleged in counts XIV to XIX, both inclusive, of the amended complaint, of the birds described in said several counts?"

Frank S. Black and *Henderson Peck* for plaintiff, appellant and respondent.

Louis Marshall and *Julius Offenbach* for defendants, respondents and appellants.

Judgment affirmed, without costs to either party, on opinion of O'GORMAN, J., below; the first and second questions certified answered in the affirmative, and the third, fourth and fifth in the negative.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

J. S. ROGERS, Respondent, *v.* THE CITY OF NEW YORK,
Appellant.

Rogers v. City of New York, 71 App. Div. 618, affirmed.
(Argued January 20, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May

8, 1902, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

George L. Rives, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for appellant.

L. Laflin Kellogg and Alfred C. Petté for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and WERNER, JJ. Absent: VANN, J. Dissenting: CULLEN, J.

OCTAVIUS O. COTTLE et al., as Executors of JOHN J. P. READ, Deceased, Respondents, *v.* WALTER CARY et al., Appellants, Impleaded with Others.

Cottle v. Cary, 73 App. Div. 54, affirmed.

(Argued January 20, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 21, 1902, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Percy S. Lansdowne and Charles L. Feldman for appellants.

Edmund P. Cottle for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ. Absent: VANN, J.

KATHERINE A. STEDWELL, as Executrix of JEREMIAH H. STEDWELL, Deceased, Appellant, *v.* HERMANN HARTMANN et al., as Executors of HERMANN H. SCHWIETERING, Deceased, Respondents.

Stedwell v. Hartmann, 74 App. Div. 126, affirmed.

(Argued January 21, 1903; decided February 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

July 14, 1902, which reversed a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial and granted a new trial.

L. Laflin Kellogg, William T. Schley and William B. Coughtry for appellant.

Jacob Marks for respondents.

Order affirmed and judgment absolute ordered for defendants on the stipulation, with costs, on opinion below.

CONCUR: PARKER, Ch. J., HAIGHT, MARTIN, CULLEN and WERNER, JJ. Not voting: BARTLETT, J. Absent: VANN, J.

CHARLES SHILAGI, by his Guardian ad Litem, PALMENA SHILAGI, Respondent, v. DEGNON-MCLEAN CONTRACTING COMPANY, Appellant.

Shilagi v. Degnon-McLean Contracting Co., 71 App. Div. 152, affirmed. (Argued January 21, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 28, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

John Ford and Henry L. Maxson for appellant.

Nelson L. Keach and Achille J. Oishei for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

8, 1902, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

George L. Rives, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for appellant.

L. Laflin Kellogg and Alfred C. Petté for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and WERNER, JJ. Absent: VANN, J. Dissenting: CULLEN, J.

OCTAVIUS O. COTTLE et al., as Executors of JOHN J. P. READ, Deceased, Respondents, *v.* WALTER CARY et al., Appellants, Impleaded with Others.

Cottle v. Cary, 73 App. Div. 54, affirmed.

(Argued January 20, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 21, 1902, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Percy S. Lansdowne and Charles L. Feldman for appellants.

Edmund P. Cottle for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ. Absent: VANN, J.

KATHERINE A. STEDWELL, as Executrix of JEREMIAH H. STEDWELL, Deceased, Appellant, *v.* HERMANN HARTMANN et al., as Executors of HERMANN H. SCHWIETERING, Deceased, Respondents.

Stedwell v. Hartmann, 74 App. Div. 126, affirmed.

(Argued January 21, 1903; decided February 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

July 14, 1902, which reversed a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial and granted a new trial.

L. Laflin Kellogg, William T. Schley and William B. Coughtry for appellant.

Jacob Marks for respondents.

Order affirmed and judgment absolute ordered for defendants on the stipulation, with costs, on opinion below.

Concur: PARKER, Ch. J., HAIGHT, MARTIN, CULLEN and WERNER, JJ. Not voting: BARTLETT, J. Absent: VANN, J.

CHARLES SHILAGI, by his Guardian ad Litem, PALMENA SHILAGI, Respondent, v. DEGNON-MCLEAN CONTRACTING COMPANY, Appellant.

Shilagi v. Degnon-McLean Contracting Co., 71 App. Div. 152, affirmed. (Argued January 21, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 28, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

John Ford and Henry L. Maxson for appellant.

Nelson L. Keach and Achille J. Oishei for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

APPOLONIA WARTH, as Executrix of ALBION WARTH, Deceased, Appellant, v. J. M. MERTENS, Individually and as Surviving Partner of the Firms of THEO. DISSELL & Co. and J. M. MERTENS & Co., Respondent.

Warth v. Mertens, 71 App. Div. 395, affirmed.

(Argued January 21, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 9, 1902, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

Rudolf Dulon and *Edward S. Clinch* for appellant.

John Brooks Leavitt for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

ALBERTINA L. ROBINSON, as Administratrix of the Estate of FREDERICK H. ROBINSON, Deceased, Respondent and Appellant, v. CHARRY C. APPLEBY et al., as Executors of HELEN C. PRATT, Deceased, Appellants and Respondents.

Robinson v. Appleby, 69 App. Div. 509, affirmed.

(Argued January 22, 1903; decided February 10, 1903.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 24, 1902, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Charles M. Stafford and *Timothy M. Griffing*, for defendants, appellants and respondents.

Thomas J. Ritch, Jr., and *Ernest W. Tooker*, for plaintiff, respondent and appellant.

Judgment affirmed, without costs ; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

ALBERT E. HELMER, as Administrator with the Will Annexed of the Estate of ROBERT HELMER, Deceased, Respondent, *v.* NEWELL MOREY et al., as Administrators of the Estate of EMILY HAWKINS, Deceased, Appellants, Impleaded with Others.

Helmer v. Morey, 64 App. Div. 625, affirmed.

(Argued January 28, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 4, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at a Special Term.

Eugene E. Sheldon for appellants.

Walter Pitcher and *C. H. Walts* for respondent.

Judgment affirmed, with costs payable out of estate; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, MARTIN, HAIGHT, VANN, CULLEN and WERNER, JJ.

PALMA COLABEL, an Infant, by her Guardian ad Litem, FRANCIS COLABEL, Respondent, *v.* METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Colabel v. Metropolitan Street R. Co., 74 App. Div. 505, affirmed.

(Submitted January 28, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 18, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown, *Bayard H. Ames* and *Henry A. Robinson* for appellant.

Morris Cukor for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

JENNIE A. COSGROVE, as Executrix of JANE COSGROVE, Deceased, Respondent, *v.* METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Cosgrove v. Metropolitan Street R. Co., 74 App. Div. 186, affirmed.
(Submitted January 23, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 30, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown, Bayard H. Ames and Henry A. Robinson for appellant.

Richard B. Aldcroftt, Jr., for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

GUGLIEMO MARCHESE, as Administrator of the Estate of ROSA MARCHESE, Deceased, Respondent, *v.* THE BELL TELEPHONE COMPANY OF BUFFALO, Appellant.

Marchese v. Bell Telephone Co. of Buffalo, 73 App. Div. 620, affirmed.
(Argued January 28, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 3, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Adolph Rebadow for appellant.

George H. Kennedy for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, BARTLETT, CULLEN and WERNER, JJ.
Absent: PARKER, Ch. J., and O'BRIEN, J. Not voting:
HAIGHT, J.

HENRY G. K. HEATH, Appellant, *v.* ANNA C. KOCH et al.,
Respondents.

Heath v. Koch, 74 App. Div. 338, affirmed.

(Argued January 26, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 25, 1902, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

Henry G. K. Heath, appellant, in person.

Emanuel J. Myers, *Charles J. McDermott* and *John B. Gleason* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J., and O'BRIEN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THE
NIAGARA FRUIT COMPANY et al., Appellants, Impleaded with
Another.

People v. Niagara Fruit Co., 75 App. Div. 11, affirmed.

(Argued January 26, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 22, 1902, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Hiram R. Wood for appellants.

John Cunneen and *Edwin H. Risley* for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

HAYWARD CLEVELAND, as Executor of CHARLOTTE HAYWARD, Deceased, Appellant, v. MARY E. POMEROY et al., Respondents.

Cleveland v. Pomeroy, 71 App. Div. 620, affirmed.

(Argued January 27, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 22, 1902, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Charles S. Taber and *George C. Case* for appellant.

Walter S. Brewster and *James H. Scrimgeour* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

THE MCKEE LAND AND IMPROVEMENT COMPANY, Appellant, v. SAMUEL B. WILLIAMS, as Treasurer of the City of Rochester, Respondent.

McKee Land & Improvement Co. v. Williams, 63 App. Div. 553, affirmed.

(Argued January 28, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 8, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at an Equity Term.

John Van Voorhis and *William Butler Crittenden* for appellant.

Charles J. Bissell and *W. A. Sutherland* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee under the Will of RICHARD N. PETERSON, Deceased, Respondent, *v.* SCHUYLER S. WHEELER, Individually, as Executor of ELLA A. WHEELER, Deceased, and as Administrator of the Estate of RICHARD S. WHEELER, Deceased, Respondent, and MARY A. STEPHENS et al., Appellants, Impleaded with Others.

United States Trust Co. v. Wheeler, 73 App. Div. 289, affirmed.
(Argued January 28, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 18, 1902, which affirmed a judgment of Special Term construing the will of Richard N. Peterson, deceased.

Jacob W. Kahn and *Edwin M. Wight* for appellants.

William N. Cohen and *Messmore Kendall* for defendant, respondent.

Edward W. Sheldon for plaintiff, respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

MAY A. FLANAGAN, as Administratrix of PETER FLANAGAN, Deceased, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Flanagan v. N. Y. C. & H. R. R. Co., 70 App. Div. 505, affirmed.
(Argued January 28, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 17, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Henry Purcell for appellant.

Thomas Hogan for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Not sitting: GRAY, J. Absent: O'BRIEN, J.

EDWARD G. RIGGS et al., as Receivers of the REPUBLIC SAVINGS AND LOAN ASSOCIATION, Respondents, v. MYRON CARTER et al., Appellants.

Riggs v. Carter, 77 App. Div. 580, affirmed.

(Submitted January 28, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 18, 1902, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

W. F. Hickey for appellants.

G. D. B. Hasbrouck and *Russell S. Johnson* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

JOHN T. HILL, Respondent, v. JOHN H. STARIN, Appellant.

Hill v. Starin, 65 App. Div. 361, affirmed.

(Argued January 30, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

November 25, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Everett P. Wheeler for appellant.

J. Arthur Corbin for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Dissenting: GRAY, J. Absent: O'BRIEN, J.

CUMMER LUMBER COMPANY, Respondent, *v.* THE ASSOCIATED MANUFACTURERS' MUTUAL FIRE INSURANCE CORPORATION OF THE STATE OF NEW YORK, Appellant.

Cummer Lumber Co. v. Associated Manfrs.' Ins. Co., 67 App. Div. 151, affirmed.

(Argued January 30, 1903; decided February 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 26, 1901, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Archibald C. Shenstone for appellant.

William B. Ellison for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Absent: O'BRIEN, J.

F. BELL FENWICK, Appellant, *v.* METROPOLITAN STREET RAILWAY COMPANY, Respondent.

Fenwick v. Mitchill, 64 App. Div. 621, reversed.

(Argued January 16, 1903; decided February 17, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

November 1, 1901, upon an order reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

John R. Dos Passos and *Donald F. Ayres* for appellant.

Henry Melville, *John L. Wells* and *Henry A. Robinson* for respondent.

Per Curiam. This appeal was argued at the same time and is governed by the same rules of law as the appeal of *Fischer-Hansen v. Brooklyn Heights R. R. Co.* (173 N. Y. 492). That case was presented by a demurrer to the complaint and resulted below in a judgment for the defendant, which was reversed upon appeal to this court. This case was tried at Special Term, but the judgment there rendered in favor of the plaintiff was reversed by the Appellate Division and a new trial was granted. Each case involved the question whether the lien of the attorney of record for the plaintiff in an action extends to the fund created by a settlement made by the parties in good faith without his consent. We held that it did and that the defendant in paying over the fund without providing for the lien paid at its peril. While the cases differ somewhat in their facts they are controlled by the same principle and must result in the same judgment. For the reasons stated in the opinion rendered in the *Fischer-Hansen* case we reverse the judgment of the Appellate Division and affirm the judgment of the Special Term, with costs in all courts.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ., concur; GRAY, J., not sitting.

Judgment reversed, etc.

GEORGE BERTSCH, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Bertsch v. Metropolitan Street Ry. Co., 88 App. Div. 228, affirmed.
(Submitted January 30, 1903; decided February 17, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

January 20, 1902, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown and *Henry A. Robinson* for appellant.

Otto H. Droege and *Isaac V. Schavrien* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Not sitting: GRAY, J. Absent: O'BRIEN, J.

LOTTIE G. DIMON, as Administratrix of HENRY G. DIMON, Deceased, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant, Impleaded with Others.

(Submitted February 9, 1903; decided February 17, 1903.)

MOTION for reargument. (See 173 N. Y. 356.)

John F. Brennan and *Charles C. Paulding* for appellant.

C. H. & J. A. Young for respondent.

BARTLETT, J. This is a motion made by the defendant company for reargument on two grounds:

(1) That the objections and exceptions relied upon by defendant for reversal specifically pointed out the language deemed objectionable; (2) that the rule laid down relating to the summing up of counsel in *Williams v. Brooklyn El. R. Co.* (126 N. Y. 96, 103) was strictly followed and that this court in considering the appeal overlooked that fact.

There was but one question presented to us on this appeal, as we could not consider the amount of damages, to wit: Whether the record contained exceptions authorizing us to examine the summing up of plaintiff's counsel and pass upon the propriety of certain portions criticized by the defendant.

In the opinion we stated generally that the record disclosed no proper exceptions raising this point, and also laid down the rule of practice when objection is sought to be made to the summing up of counsel.

There is nothing in this rule inconsistent with the decision of *Williams v. Brooklyn El. R. R. Co. (supra)*.

After the plaintiff's counsel had been addressing the jury for some little time, the defendant's counsel said: "I note on the record an exception to these remarks."

At this point there was no objection, no ruling of the court and no indication of the particular language objected to.

The plaintiff's counsel continued his summing up for several minutes, when defendant's counsel said: "I object to all this and except as going outside of the record. The address of Mr. Crennan is no doubt very eloquent, but I wish to note an objection and an exception to it. We have a record here of his remarks." The court: "Very well."

At this point it was the address that was objected to and exception taken. It is not claimed by defendant's counsel that the entire address was improper, as only certain portions of it were pointed out in the brief.

The plaintiff's counsel then resumed his address to the jury and, after three or four sentences, the defendant's counsel said, interrupting: "I take an exception to that as well. If the court so wishes, we will not interrupt further, but take our other exceptions at the close of the summing up." The court: "Yes."

There was no objection at this point and no ruling of the court.

At the close of the summing up, the court said: "Now, Mr. Brennan," evidently calling the attention of the defendant's counsel to his suggestion that he would take his other exceptions at this point, whereupon the defendant's counsel said: "We object to the reference of visiting the tomb and the future immortality of the jury if they will only accede to the request of counsel for the plaintiff, and the reference to the prayers here of the children, as appealing entirely to passion and prejudice and not being within the lines of the law on which this case should be tried."

The court made no ruling on this objection, nor was there any exception taken.

There can be no examination by the court of the summing up of counsel unless the language objected to is definitely

pointed out by objection, a ruling of the court made thereon and exception taken. (*Crumpton v. United States*, 138 U. S. 361.)

The motion for reargument should be denied, with ten dollars costs.

PARKER, Ch. J., HAIGHT, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

Motion denied.

MALACHI FARRELL, Appellant, v. CITY OF MIDDLETOWN,
Respondent.

(Submitted February 9, 1903; decided February 17, 1903.)

Motion for reargument denied, without costs. (See 172 N. Y. 666.)

GEORGE L. WILCOX, Appellant, v. THE EQUITABLE LIFE
ASSURANCE SOCIETY OF THE UNITED STATES, Respondent.

(Submitted February 9, 1903; decided February 17, 1903.)

Motion for reargument denied, with ten dollars costs. (See 173 N. Y. 50.)

OCTAVIUS O. COTTLE et al., Appellants, v. THE COUNTY OF
ERIE et al., Respondents.

(Submitted February 9, 1903; decided February 17, 1903.)

Motion for reargument denied, with ten dollars costs. (See 173 N. Y. 591.)

JOSEPH GREENWALD et al., Respondents, v. AUGUSTUS WALES,
Sheriff of Broome County, Appellant.

Reported below, 67 App. Div. 628.

(Argued February 9, 1903; decided February 17, 1903.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 22, 1902, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial.

department, entered November 17, 1902, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the action is upon individual undertakings on appeal and the decision of the Appellate Division was unanimous.

Carlton B. Pierce for motion.

Clarence L. Barber opposed.

Motion granted, with costs in this court.

In the Matter of the Petition of MICHAEL T. DALY, as Commissioner of Public Works of the City of New York, Respondent, to Acquire Certain Real Estate for the Protection of the Water Supply of the City of New York.

LEWIS E. COLE et al., Appellants.

Matter of Daly, 72 App. Div. 394, appeal dismissed.
(Argued February 9, 1903; decided February 17, 1903.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 9, 1902, which modified, and affirmed as modified, an order of Special Term setting aside the report of commissioners of appraisal.

The motion was made upon the grounds that the order appealed from was made in a special proceeding and is not a final order determining such proceeding.

George L. Rives, Corporation Counsel (*Theodore Connolly* of counsel), for motion.

Isaac N. Mills opposed.

Motion granted, with costs, on the ground that the order is not a final determination of the proceeding.

MELLE S. T. WERNER, Respondent, *v.* WILLIAM R. HEARST,
Appellant.

Reported below, 76 App. Div. 375.

(Submitted February 9, 1908; decided February 17, 1908.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 16, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the grounds that there were no questions of law involved which could be considered by the Court of Appeals, that the exceptions were frivolous and the order granting leave to appeal was irregular.

Roger M. Sherman for motion.

No one opposed.

Motion denied on ground that the papers filed are insufficient.

In the Matter of the Estate of MARY KILLAN, Deceased.
MARY KILLAN, Appellant; MILES T. O'REILLY, Respondent.

(Submitted February 9, 1908; decided February 17, 1908.)

MOTION to amend remittitur. (See 172 N. Y. 547.)

Motion granted so that remittitur shall read as follows:
"Order reversed and proceedings remitted to the Surrogate's Court of Monroe county for further action, with costs in all the courts to appellant to abide the event, to be paid by the respondent personally, without costs.

JOHN KEIRNS, Respondent, v. THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants.

Keirns v. N. Y. & Harlem R. R. Co., 60 App. Div. 630, reversed.
(Argued November 18, 1902; decided February 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 7, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Ira A. Place, Alexander S. Lyman and Thomas Emery for appellants.

Alfred B. Cruikshank, Henry G. Atwater and John C. Thomson for respondent.

Per Curiam. Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries v. N. Y. & Harlem R. R. Co.* (169 N. Y. 270), and *Muhlker v. N. Y. & Harlem R. R. Co.* (173 N. Y. 549).

VANN, J. (concurring). The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis v. N. Y. & Harlem R. R. Co.*, 162 N. Y. 202.) The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (*Fries v. N. Y. & Harlem R. R. Co.*, 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the company's

user for twenty years acquired the exclusive right to interfere with the easements of light, air and access ; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run to be changed ; to cause to be erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker v. N. Y. & Harlem R. R. Co.*, 173 N. Y. 549.)

I concurred in the dissenting opinion of Judge CULLEN in the *Fries* case and should have concurred in that of Judge BARTLETT in the *Muhlker* case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and WERNER, JJ. (and VANN, J., in memorandum), concur ; GRAY, J., not sitting.

Judgment reversed, etc.

ANNA SIEGEL, Respondent, v. THE NEW YORK AND HARLEM
RAILROAD COMPANY et al., Appellants.

Siegel v. N. Y. & Harlem R. R. Co., 62 App. Div. 290, reversed.
(Argued October 23, 1902; decided February 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 24, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Ira A. Place, Alexander S. Lyman and Thomas Emery for appellants.

Joseph A. Flannery for respondent.

Judgment reversed and complaint dismissed, without costs ; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not sitting: GRAY, J.

ALICE I. BIRRELL, Respondent, v. THE NEW YORK AND
HARLEM RAILROAD COMPANY et al., Appellants.

Birrell v. N. Y. & Harlem R. R. Co., 60 App. Div. 630, reversed.
(Argued November 18, 1902; decided February 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 7, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Ira A. Place, Alexander S. Lyman and Thomas Emery for appellants.

Alfred B. Cruikshank, Henry G. Atwater and John C. Thomson for respondent.

Judgment reversed and complaint dismissed, without costs ; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ. Not sitting: GRAY, J.

BENJAMIN SELETSKEY, an Infant, by HAYMAN SELETSKEY, his Guardian ad Litem, Respondent, *v.* THE THIRD AVENUE RAILROAD COMPANY, Appellant.

Seletskey v. Third Avenue R. R. Co., 69 App. Div. 27, affirmed.
(Argued January 12, 1903; decided February 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 14, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown, Addison C. Ormsbee and Henry A. Robinson for appellant.

J. Charles Weschler for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ. Dissenting: PARKER, Ch. J., and GRAY, J.

JOHN G. HASSARD, Appellant, *v.* UNITED STATES OF MEXICO et al., Respondents.

Hassard v. United States of Mexico, 46 App. Div. 623, affirmed.
(Submitted February 9, 1903; decided February 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 26, 1899, which affirmed an order of Special Term dismissing the complaint and vacating a warrant of attachment.

Franklin Bien for appellant.

Ernest E. Baldwin and Henry L. Burnett for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and WERNER, JJ.

In the Matter of THE CITY OF ROCHESTER, Appellant, v.
JOSEPH B. BLOSS, Respondent.

Matter of City of Rochester v. Bloss, 77 App. Div. 28, affirmed.
(Argued February 9, 1903; decided February 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 28, 1902, which reversed an order of the Monroe County Court denying a motion to vacate an order requiring Joseph B. Bloss to appear and be examined concerning his property in a proceeding to enforce the collection of an unpaid tax upon personal property.

William A. Sutherland for appellant.

Isaac Adler for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, HAIGHT, MARTIN and VANN, JJ. Not voting: O'BRIEN and WERNER, JJ.

In the Matter of the Application of HENRY P. MORRISON,
Appellant, for a Peremptory Writ of Mandamus against
JACOB A. CANTOR, Individually and as President of the
Borough of Manhattan of the City of New York, et al.,
Respondents.

Matter of Morrison v. Cantor, 75 App. Div. 480, affirmed.
(Argued February 9, 1903; decided February 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 13, 1902, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to reinstate the petitioner in the position of chief engineer in the bureau of highways of the borough of Manhattan and dismissed the petition.

Roger Foster for appellant.

George L. Rives, Corporation Counsel (*Theodore Connoly* and *William B. Crowell* of counsel), for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and WERNER, JJ.

JENNIE KELLY, Appellant, *v.* EDWARD M. MOORE et al.,
Defendants.

JAMES J. NEALIS, as Receiver, Respondent.

Kelly v. Moore, 74 App. Div. 626, appeal dismissed.

(Argued February 9, 1908; decided February 24, 1908.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 24, 1902, which modified and affirmed as modified an order of Special Term passing the accounts of the receiver herein.

Jacob Fromme for appellant.

Peter Eagan for respondent.

Appeal dismissed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and WERNER, JJ.

PEOPLE ex rel. B. AYMAR SANDS, Appellant, *v.* THOMAS L. FEITNER et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

REVIEW OF ASSESSMENT—UNANIMOUS AFFIRMANCE—FINDING OF FACT. The restriction imposed by the Constitution upon the review of a unanimous decision of the Appellate Division that there is evidence supporting a finding of fact applies to an order of affirmance in a statutory proceeding to review an assessment in which a trial *de novo* has been had at Special Term, upon new evidence, as to the value of the relator's property, resulting in an affirmance of the assessment and a dismissal of the writ of certiorari, and the effect of such an order is a determination that

the finding of fact as expressed or necessarily implied in the decision of the Special Term is supported by evidence, and, therefore, is not the subject of review in the Court of Appeals.

People ex rel. Sands v. Feitner, 76 App. Div. 620, affirmed.

(Argued February 10, 1903; decided February 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 28, 1902, which affirmed an order of Special Term dismissing a writ of certiorari to review the proceedings of the defendants in assessing personal property of the relator.

John M. Bowers and *L. G. Reed* for appellant.

George L. Rives, Corporation Counsel (*George S. Coleman* and *David Rumsey* of counsel), for respondents.

PARKER, Ch. J. This record does not present a single question now open to review in this court.

The controversy grows out of an assessment against relator of \$50,000 for personal property. He complained of it to the taxing authorities, and asked them to eliminate the assessment from the roll, which they refused to do. Thereupon he instituted the proceeding authorized by statute to review the assessment, alleging in the petition that his entire taxable property was \$194,556, while his lawful indebtedness was \$258,499. The indebtedness was entirely owing to a firm of stockbrokers, who had purchased stocks for him of about that value. The claim of the tax commissioners was that the relator's so-called indebtedness to his broker was not an actual and unconditional indebtedness, but that the transaction was purely speculative, and that, for all that appears, the assets in the hands of the broker were quite equal in value to the amount of the indebtedness incurred in the purchase.

This statement sufficiently suggests the nature of the controversy, which was on the one hand that the relator had personal assets over and above the indebtedness and equal to the amount of the assessment, and on the other hand that he had not.

This question was passed upon by the Special Term

adversely to the relator's contention and the writ of certiorari was, accordingly, dismissed. An appeal was then taken to the Appellate Division, where that question was again considered and the same conclusion reached as at the Special Term, whereupon the court unanimously affirmed the order of the Special Term.

The question of fact thus passed upon by the courts is not reviewable in this court, nor is the question whether it ought to be reviewable open for discussion at this time. It was carefully considered and decided in *People ex rel. Manhattan R. Co. v. Barker* (152 N. Y. 417), one judge dissenting in an opinion which assumes that the question of fact which the Appellate Division had unanimously affirmed — if one had been — was determined by the assessors. The majority opinion, however, makes it clear that while the proceeding is known as that of certiorari, still it has new and unprecedented powers authorizing the determination of the questions of fact upon further evidence taken in a court of first review. The court says: "The special statutory writ now before us differs from its predecessors in one remarkable respect, in that it permits a redetermination of all questions of fact upon evidence, taken in part at least, by the Special Term, or under its direction. * * * What is called a review may thus become a proceeding in the nature of a new trial. The return is not conclusive, as in common-law and Code writs. (*People ex rel. Miller v. Wurster*, 149 N. Y. 549; *Harris on Certiorari*, § 126.) The provisions of the Code do not apply to it. (*People ex rel. Church of H. C. v. Assessors*, 106 N. Y. 671.) The petition is regarded as the complaint, the return as the answer, and, in deciding the issues joined thereby, the court may call witnesses to its aid and their testimony becomes a part of the proceeding upon which the determination of the court is to be made. That determination is a revaluation and it may be a different valuation of the property assessed. Such was the method of procedure in this case. A new trial was had, somewhat like the new trial in County Court upon appeal for that purpose from Justice's Court. New evidence was taken, which, by command of the statute, the court was bound to consider in making its determination.

In other words, it was the duty of the court to retry the questions of fact and decide them over again, and whether its findings were written out or left to necessary implication, there is no escaping the conclusion that the facts are conclusively presumed to have been decided *de novo*. (*Amherst College v. Ritch*, 151 N. Y. 282.) Thus, the writ under consideration may be a writ of review merely, and hence properly called a writ of certiorari, and it may be in the nature of a *venire de novo* and utterly foreign in function to the writ of certiorari as known in the history of the law."

Upon reasoning such as I have quoted, but further elaborated, the court held that the restriction imposed by the Constitution upon the review of a unanimous decision of the Appellate Division that there is evidence supporting a finding of fact applies to an order of affirmance in a statutory proceeding to review an assessment in which a trial *de novo* has been had at Special Term upon new evidence as to the value of the relator's property, resulting in an affirmance of the assessment and a dismissal of the writ of certiorari, and necessarily, therefore, that the effect of an order of affirmance unanimously made by an Appellate Division is a determination that the finding of fact as expressed or necessarily implied in the decision of the Special Term is supported by evidence, and, therefore, not the subject of review in this court.

It will be seen that that case entirely covers the questions of practice which have been suggested in this one, and it has been so frequently followed that the question would not now be open for reconsideration were we of the opinion that a different rule was possible at the time of the decision quoted (*supra*), and we are not.

The order should be affirmed, with costs.

GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and WERNER, JJ.,
concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRANCIS M. RUTHERFURD, Appellant, v. PEREZ M. STEWART, as Superintendent of Buildings for the Borough of Manhattan, City of New York, Respondent.

People ex rel. Rutherford v. Stewart, 78 App. Div. 643, affirmed.
(Argued February 10, 1903; decided February 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 14, 1903, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to reinstate the relator in the position of inspector of buildings in the borough of Manhattan.

A. S. Gilbert and *Elgar M. Leventritt* for appellant.

George L. Rives, Corporation Counsel (*Theodore Connoly* and *William B. Crowell* of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and WERNER, JJ.

PATRICK DOWNS, Appellant, v. THE CITY OF NEW YORK, Respondent.

Downs v. City of New York, 75 App. Div. 423, affirmed.
(Argued February 10, 1903; decided February 24, 1903.)

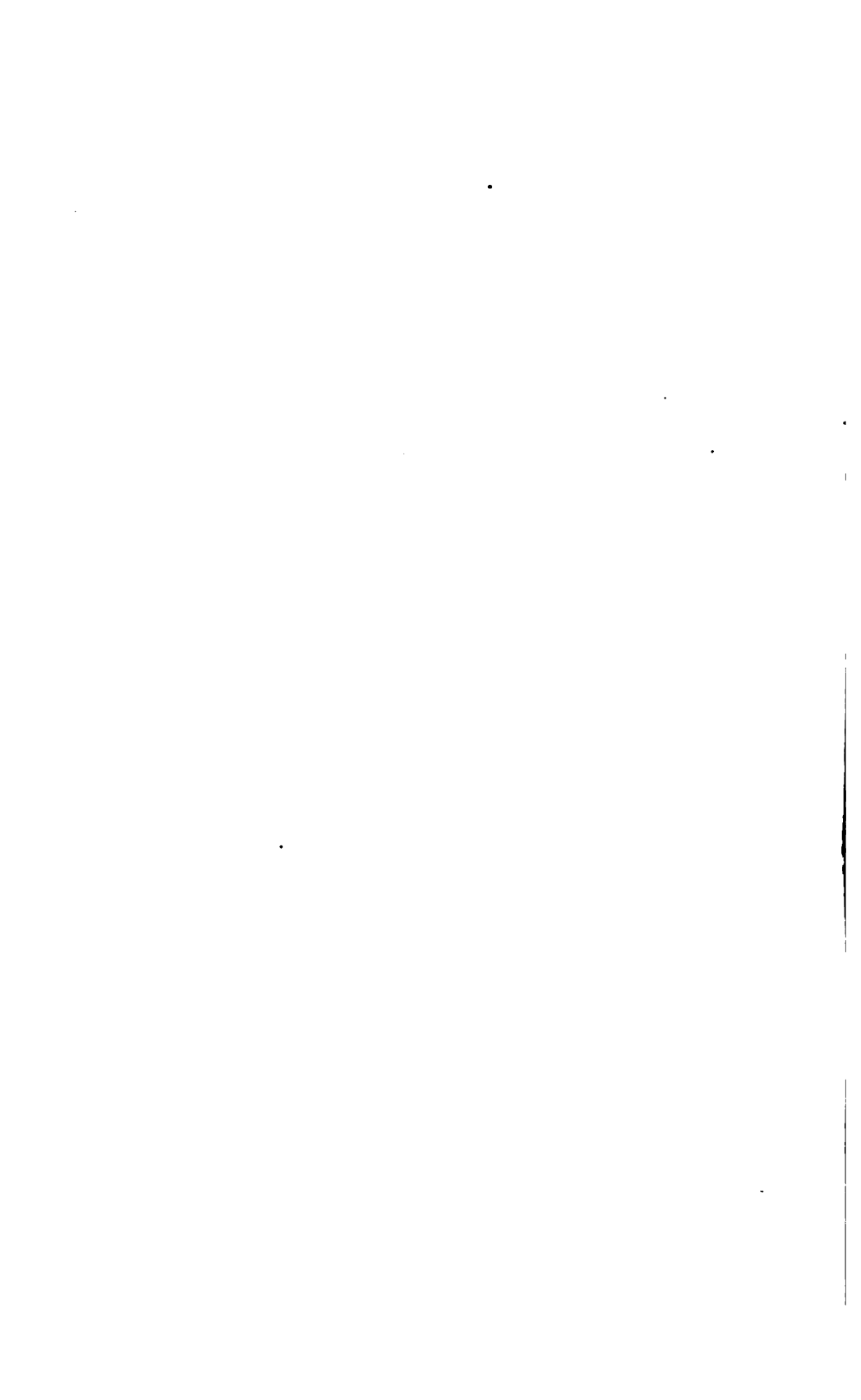
APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 11, 1902, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and dismissing the complaint.

Charles Blandy and *Thomas W. Burke* for appellant.

George L. Rives, Corporation Counsel (*Theodore Connoly*, *Edward J. McGuire* and *Arthur Sweeny* of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, VANN and WERNER, JJ.



INDEX.

ABANDONMENT.

When not necessary to constitute a constructive total loss under a policy of marine insurance.

See INSURANCE, 2.

ACCOUNTING.

For profits arising from speculation.

See APPEAL, 6.

Action for, by residuary legatee against trustees — may be commenced before death of life tenant.

See JUDGMENT, 1, 2.

ADMISSION.

Of liability by mutual benevolent society.

See ASSOCIATIONS, 8.

ALIENATION.

Power of — when not suspended for more than two lives in being.

See DECEDENT'S ESTATE, 3.

Suspension of power of.

See WILL, 3.

ALIMONY.

Judgment for, constitutes property of wife, of which she cannot be deprived without due process of law.

See CONSTITUTIONAL LAW, 4.

APPEAL.

1. *Dismissal of, When Question of Fact Might Be Involved in Decision upon the Merits.* Where, it appears from the record that the question whether the acts of the grantor are reasonable or unreasonable might, under some circumstances, involve an inquiry of fact, depending, among other things, upon the nature of the changes in its business and the necessity for improvement, an appeal from a judgment of the Appellate Division reversing, upon the law and the facts, a judgment of the Special Term, in an action brought to restrain it from constructing or extending a pier in front of the grantee's lots, will be dismissed. *India Wharf Br. Co. v. Bklyn. W. & W. Co.* 167

2. *Charge Must Be Considered in its Entirety.* An objectionable statement in a charge should be considered in connection with the whole of the charge upon the subject, and error can only be predicated if, upon such consideration, it is plain that the jury may have been misled as to the scope of their investigation. *Continental Nat. Bank v. Tradesmen's Nat. Bank.* 272

3. *Refusal to Charge — Repetition.* The refusal of a requested charge is not erroneous when its subject-matter has been sufficiently covered by the charge already given. *Id.*

4. *Question of Fact.* An appeal to the Court of Appeals from an order of the Appellate Division which involves a question of fact must be dismissed. *Matter Board of Education, City of New York.* 321

5. *Question Not Raised Below.* An objection that the summing up of counsel upon the trial of an action was improper in that it was not con-

APPEAL — Continued.

finer to the evidence, but was an inflammatory appeal to the passions and sympathies of the jury, which resulted in an excessive verdict, cannot be considered on appeal to the Court of Appeals where the record presents no proper exception raising it. *Dimon v. N. Y. C. & H. R. R. Co.* 356

6. *Nonsuit*. The dismissal of the complaint after the plaintiff had rested in an action to compel an accounting for profits alleged to have been made by the defendants in speculating in the stock of a corporation, part of which profits by certain agreements were alleged to belong to the plaintiff, "upon the ground that each of the agreements set forth in the complaint was and is contrary to public policy and void, and that the plaintiff, therefore, has no cause of action against the defendants upon either of said agreements," is a nonsuit, and the plaintiff is entitled to have it reviewed in the light of the facts and inferences most favorable to him. *Veazey v. Allen*. 359

7. *Statute of Limitations — Question of Fact*. When the trial court made no finding on the question whether the Statute of Limitations barred plaintiff's claim in an action, and the reversal by the Appellate Division is not stated to be on the facts, the question is not reviewable in the Court of Appeals. *Matteson v. Palser*. 404

Charge to grand jury not properly authenticated cannot be considered.

See CRIMES, 8.

Power of Court of Appeals to reverse judgment of death entered upon verdict of jury.

See CRIMES, 12.

Improper statement of counsel in summing up not the subject of review unless proper exception is taken — denial of motion to withdraw a juror not reviewable in Court of Appeals.

See TRIAL, 3, 4.

APPELLATE DIVISION.

Reversal by, upon the law and the facts — when appeal from order will be dismissed.

See APPEAL, 1.

Order of, involving question of fact — when appeal from, must be dismissed.

See APPEAL, 4.

Reversal by, not stated to be on the facts — question as to bar of Statute of Limitations not reviewable in Court of Appeals.

See APPEAL, 7.

APPORTIONMENT.

Of loss among co-insurers.

See INSURANCE, 4-6.

ASSESSMENTS.

In New York city — when must be reviewed by board of revision of assessments.

See NEW YORK (CITY OF), 4.

ASSIGNMENT.

For Creditors — (L. 1877, Ch. 466) — When Assignee's Sale May Be Set Aside upon Summary Application. Under the General Assignment Act (L. 1877, ch. 466, as amd.) the conversion, disposition and distribution of an assigned estate is, from its inception, a proceeding in court, and the

ASSIGNMENT — *Continued.*

administration of the estate, though made by the assignee who, in the first instance at least, is selected by the assignor, is really made by the court; a purchaser at an assignee's sale, therefore, makes himself a party to the proceeding and subjects himself to the jurisdiction of the court, which, in a proper case, without action brought, has power upon a summary application in the proceeding to set the sale aside and vacate it. *Matter of Sheldon.* 287

ASSOCIATIONS.

1. *What Constitutes Dedication of Lands of Residence Park Association — Trespass.* The leasing for a long term of years of lots laid out on a map or plan of lands of a camp meeting and summer residence park association, showing such lots and the roads and streets to be used for access thereto, constitutes a dedication of the land in such streets and roads to the use of the lot lessees, and the association cannot maintain an action of trespass against a person using a road for access to the premises of a lessee for the purpose of delivering merchandise and supplies to the lessee at his request. *Thousand Island Park Assn. v. Tucker.* 203

2. *Residence Park Association — Statute Authorizing Association to Establish Rules Regulating Trade upon Grounds Thereof Does Not Authorize a Monopoly.* A statute (L. 1883, ch. 278) authorizing such association to purchase and deal in provisions and other commodities for supplying lessees and visitors and to maintain stores and shops for that purpose and empowering the association to authorize others to engage in such pursuits in the park, and to make and maintain regulations therefor, cannot be construed so as to give the association, its agents or licensees, the exclusive privilege of dealing in merchandise and supplies within the limits of the park, since the power to regulate does not authorize the creation of a monopoly. *Id.*

3. *Reservation of Power to Regulate Contemplates Reasonable Regulation.* Where the leases granted by the association expressly recited certain regulations previously adopted, to which the lessees assented and with which they agreed to comply, a further condition and covenant that the lessees should keep and perform all such rules and regulations as the association should from time to time impose does not reserve to the association an absolute and unqualified power of adopting regulations; and a new regulation, to be valid, must be reasonable and consistent with those existing at the time the leases were made, and where none of such regulations restricted the right of the lessees to purchase supplies for consumption in the park where and from whom they pleased, a subsequent regulation in effect forbidding tenants to purchase supplies except at stores operated or licensed by the association, unless they personally bring such supplies upon the grounds, is arbitrary and unreasonable. *Id.*

4. *When Sales to Lessees by Unlicensed Dealer Cannot Be Restrained.* Under a regulation providing that "All traffic in vegetables, meats, groceries, newspapers and all other articles of merchandise usually sold in the markets and stores of the association, or any huckstering whatsoever without permission, on its docks and grounds, is hereby prohibited," the association cannot maintain an action for an injunction restraining a person, who delivered supplies to lot holders in compliance with orders sent to him by mail, from selling and delivering goods to lessees in this manner, upon the ground that such business interfered with and lessened the pecuniary value of the exclusive rights of the plaintiff, since it has no statutory or contract right to restrict the right of the lessees to purchase their supplies where and from whom they please. *Id.*

5. *Mutual Benevolent Society — Action by Administratrix as Quasi Trustee for Beneficiaries of Death Benefit.* The administratrix of a deceased member of a mutual benevolent society who "is entitled in

ASSOCIATIONS — Continued.

case of his death to the receipt by his heirs" of a specified fund, and she being one of the beneficiaries, may maintain an action to recover the fund as a *quasi* trustee for those represented by the word "heirs," which is not used in its strictly technical sense as representing persons entitled to inherit real estate, but rather as indicating the next of kin entitled to the fund. *Pfeifer v. Supreme Lodge B. S. B. Socy.* 418

6. *Payment to its Own Trustee Does Not Release Society from Liability.* The payment by "The Supreme Lodge of the Bohemian Slavonian Benevolent Society of the United States" of the amount of a death benefit raised by assessment upon all its subordinate lodges, to a trustee designated to receive it by the grand lodge of the state of New York and a subordinate lodge of which the intestate was a member, does not release it from liability to the proper beneficiaries in an action against the society brought by his administratrix for their benefit to recover such amount. *Id.*

7. *When Issuance of Certificate Showing Member Entitled to Benefit Is Not a Condition Precedent to Recovery.* The fact that the constitution of such society provides that an applicant for benefits "must state to whom the death benefit shall be paid in case of his death" does not require the issuance by the society of a certificate designating the beneficiary and showing that the member is entitled to the benefit, as a condition precedent to a recovery in such action, where he was a member prior to the adoption of such provision and another provision excepts "members of the order who are members entitled to the death benefit," thus excepting existing members from the operation of the former provision. *Id.*

8. *Admissions of Liability.* A death notice sent to the defendant by the subordinate lodge of which the intestate was a member and by the grand lodge of the state of New York reciting that he had paid up to the time of his death all dues "and is, therefore, entitled to benefit in the sum of one thousand dollars," taken in connection with the fact that the defendant levied the assessment, raised the amount and transferred it to the selected trustee in the state of New York, constitutes a clear admission of the liability of the defendant in such an action. *Id.*

ATTACHMENT.

1. *Attachment against Solvent National Bank Prohibited — U. S. R. S. § 5242.* Section 5242 of the United States Revised Statutes, prohibiting the issuing of an attachment before judgment against national banking associations by any state, county or municipal court, applies to a solvent national bank. *Van Reed v. People's Nat. Bank.* 314

2. *Acts Prohibiting Attachment Not Repealed by Act of Congress of 1882 — Construction of Act of 1882.* The act of Congress of July 12, 1882 (22 U. S. Stat. at Large, 162), did not repeal the earlier acts of Congress prohibiting attachments against national banking associations — that act was intended to prescribe the forum for litigation by and against national banks and does not relate to provisional remedies to be had in such actions. It was designed to prescribe the place where and the courts in which such actions may be prosecuted, but it was not intended to regulate the procedure in such actions when brought, nor was it intended to so regulate the method of commencing an action as to enable a state court to acquire jurisdiction over the property of a national bank without acquiring jurisdiction of the bank itself. *Id.*

ATTORNEY AND CLIENT.

1. *Code Civ. Pro. § 66.* Section 66 of the Code of Civil Procedure, relating to an attorney or counsel's compensation, giving a lien upon his client's claim and cause of action from the commencement of the action

ATTORNEY AND CLIENT — *Continued.*

or special proceeding, and providing a new remedy for its enforcement, is remedial and should be liberally construed. *Fischer-Hansen v. Brooklyn H. R. R. Co.* 492

2. *Attorney's Lien — Enforcement after Settlement by the Parties before Trial by Equitable Action.* Where a claim and cause of action are extinguished by a settlement made by the parties before judgment, the statute impliedly, although not expressly, provides that the attorney's lien shall extend to the proceeds, and it attaches to the fund the instant it is created by the settlement, so that a party who with actual or constructive notice of the lien pays the fund over to the other, does so at his peril, and is liable to the attorney for the amount of his lien in an equitable action to enforce it, where he is unable to collect it from his client on account of his financial irresponsibility. This does not prevent an honest settlement in good faith of his cause of action by the latter, but it does protect the reciprocal right of his attorney to follow the proceeds, and that the legislature intended to protect. *Id.*

3. *Code Remedy Not Exclusive — What Must and May Be Shown in Such Action.* The fact that the statute provides a remedy by petition for the enforcement of the lien does not prevent the maintenance of such an action, since that remedy is cumulative and not exclusive; but in such an action the plaintiff must show that he comes within the statute by establishing the facts alleged in his complaint, and it is open to any defense tending to show that no lien ever existed, or that if it once existed it was discharged with the consent of the plaintiff, or was waived, or forfeited by his misconduct or neglect. *Id.*

ATTORNEYS.

Improper summing up of counsel.

See TRIAL, 2, 3.

BANKING.

1. *Negligent Certification of Draft — Money Paid by Mistake.* A bank which has negligently certified a raised draft cannot recover back its amount, as moneys paid by mistake, from another bank with which the draft was deposited, and which, relying upon the negligent acts of the former bank in certifying, accepting and paying the draft, parted with the moneys upon the demand of its depositor. *Continental Nat. Bank v. Tradesmen's Nat. Bank.* 272

2. *Certification of Draft — Estoppel.* The liability of a bank to bear the loss arising from its negligent certification of a raised draft, the amount of which it paid to a bank with which the draft had been deposited, and which, in reliance on the acceptance, payment and retention of the instrument by the certifying bank, paid the depositor, rests, not upon the mere certification, but upon the estoppel arising from its subsequent acts and continued negligence until it was too late to protect itself or the bank with which the draft was deposited from loss. *Id.*

3. *Trial — Payment of Draft — Question for Jury.* It is a question for the jury, to be determined upon consideration of the rules of the clearing house and the evidence, whether a bank, which made payments to a depositor upon the faith of a raised draft which had been certified by another bank and which had been sent to the clearing house, was warranted in considering the draft as one that had been paid, and whether it acted in good faith in paying out the moneys to its depositor. *Id.*

BANKS.

Attachment against solvent national bank prohibited.

See ATTACHMENT, 1, 2.

BENEFIT ASSOCIATIONS.

Action by administratrix as *quasi* trustee for beneficiaries of death benefit — payment to its own trustee does not release society from liability — when issuance of certificate showing member entitled to benefit is not a condition precedent to recovery — admissions of liability.

See ASSOCIATIONS, 5-8.

BILLS, NOTES AND CHECKS.

When Maker of Note Signed by him as "Trustee," Is Not Personally Liable — Negotiable Instruments Law (L. 1897, Ch. 612, § 89) — Question of Fact. A trustee of an insolvent firm, for the benefit of creditors thereof, appointed by such firm and its creditors, is not personally liable under the provisions of the Negotiable Instruments Law (L. 1897, ch. 612, § 39), upon a note signed by him as "trustee," but without disclosing his representative character upon the face of the note, where the payee is one of such creditors and the consideration for which the note was given was property purchased from the payee for the benefit of the trust estate; but where in an action upon the note, brought by the payee, against the maker, the evidence is conflicting as to whether the property, for which the note was given, was purchased for the benefit of the trust estate and whether the plaintiff agreed to accept the note of defendant in his representative capacity, the direction of a verdict in favor of the defendant is reversible error. *Megowan v. Peterson.* 1

Negligent certification of draft — money paid by mistake — estoppel — payment of draft.

See BANKING, 1-3.

BONDS.

1. *Mistake of Law — Drafted Men Not Liable for Moneys Received under the Void Drafted Men's Act (L. 1892, Ch. 664).* Money loaned to a town upon the security of bonds issued under chapter 664 of the Laws of 1892 for the relief of certain persons drafted into the military service of the United States under the act of Congress passed March 3, 1863, known as the Conscription Act, and paid over by the county treasurer to such drafted men, cannot be recovered from them by the bondholders, after the statute has been declared void by the courts of this state, where no fraud is alleged and no question of a trust in favor of or against any one is involved, since the money was received by the drafted men under a mutual mistake of law and under a claim of right, and they are under no liability to restore it to the bondholders. *Newburgh Sav. Bank v. Town of Woodbury.* 55

2. *Municipal Bonds — Validity of, in the Hands of Bona Fide Holders Affected Only by Fundamental Defect in Creation.* Negotiable municipal bonds in the hands of *bona fide* holders are unassailable upon any ground that does not relate to the authority for their issue. If there is any element of fraud or irregularity in the conduct of the officers, or of the agents, through whom the bonds pass into the channels of business, it is not chargeable to an innocent purchaser. *Citizens' Sav. Bank v. Town of Greenburgh.* 215

3. *Town Highway Bonds — Sale of, at Their Face Value, Exclusive of Interest, in Violation of Statute, Does Not Affect their Validity in the Hands of Innocent Purchasers.* Town bonds issued under chapter 493 of the Laws of 1892, providing for the construction of highways running through two or more towns of the same county, "executed by the supervisor and town clerk" thereof and delivered to the said commissioners to be paid out by them, at not less than par, in liquidation of the said damages, etc., or, at their option, "to be sold at not less than par and the proceeds thereof applied as aforesaid" (§ 6), become complete obligations when executed. Their delivery to the commissioners has no relation to their creation. Their sale "flat," that is, without taking into account the

BONDS — Continued.

interest which had accrued upon them, by such commissioners, which, if not fraudulent, was a deviation from the authority they possessed, constitutes an irregular exercise of the power to dispose of the bonds but does not affect their validity in the hands of innocent holders for value. *Id.*

Resolution by taxpayers of village to purchase water works system — language sufficient to authorize issue of bonds for such purpose.

See VILLAGES.

BUFFALO (CITY OF).

Slight defect in crosswalk — exemption from liability.

See NEGLIGENCE, 1.

BURGLARY.

Attempt to commit — overt act.

See CRIMES, 6.

CARRIERS.

Injury resulting from overcrowded platform of horse car.

See NEGLIGENCE, 7-9.

CAUSE OF ACTION.

On contract for speculation in stock.

See APPEAL, 6.

CERTIFICATION.

Of draft — negligence — estoppel.

See BANKING, 1, 2.

CHARGE.

Must be considered in its entirety.

See APPEAL, 2.

Refusal to charge repetition.

See APPEAL, 3.

To grand jury not properly authenticated cannot be considered on appeal.

See CRIMES, 8.

To jury — trial for murder.

See CRIMES, 14.

CHILDREN.

Employment of children under fourteen years of age in factory — civil liability of employer.

See NEGLIGENCE, 5, 6.

CIVIL SERVICE.

Veteran volunteer fireman discharged from municipal position for "lack of work" not entitled to reinstatement or to position held by another employee.

See NEW YORK (CITY OF), 5.

CODE OF CIVIL PROCEDURE.

1. § 66 — *Attorney and Client.* Section 66 of the Code of Civil Procedure, relating to an attorney or counsel's compensation, giving a lien upon his client's claim and cause of action from the commencement of the action or special proceeding, and providing a new remedy for its enforcement, is remedial and should be liberally construed. *Fischer-Hansen v. B. H. R. R. Co.*

CODE OF CIVIL PROCEDURE — Continued.

2. § 758 — *Pleading — Action against Personal Representative of Deceased Joint Debtor — Insolvency of the Survivors or their Inability to Pay Must Be Alleged.* While section 758 of the Code of Civil Procedure, relating to proceedings upon the death or disability of a party, provides that "the estate of a person or party jointly liable upon contracts with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter," that section does not dispense with the necessity of appropriate averments and proof of the insolvency, or the inability to pay, of the surviving joint debtors when joining the personal representatives of the decedent as defendants in an action upon the contract. The section creates the legal liability, but does not change the rule of procedure, and the remedy to enforce the liability is to be pursued upon such pleadings and proofs as would show an equitable reason for joining the personal representatives of a deceased joint debtor as defendants in an action against the survivors upon the contract. *Potts v. Dounce.* 335

3. § 841 — *Evidence — Presumption of Death.* It seems, that section 841 of the Code of Civil Procedure, relating to the presumption of death in certain cases, relates only to a case where the right to the possession of real property depends upon the life of a third person and has no application to a person who is the owner of the property. *Matter of Board of Education.* 321

4. §§ 1843-1860 — *Action to Charge Heirs at Law and Devisees with Debts of their Decedents — Grantees under Trust Deed Not Liable as Heirs at Law.* Where, in an action brought by a creditor under sections 1843-1860 of the Code of Civil Procedure against the heirs at law of two deceased sisters to recover a deficiency arising upon the foreclosure, after their death, of a mortgage made by them in their lifetime to secure the payment of their note to plaintiffs' assignor, the children of one of the co-debtors did not derive title to their mother's real property by descent or devise, but as grantees under a conveyance of all her property made in her lifetime to a trustee, whereby she reserved to herself the income thereof during her life, and on her death gave the remainder to her children, they are not liable for their mother's debt as the heirs at law of her real property, in the absence of proof that the conveyance was made with intent to defraud her creditors, and that at the time of the execution thereof the mortgaged property was not sufficient to pay plaintiffs' note, which proof can only be adduced in an action brought by one creditor in behalf of himself and all other creditors, under section 232 of the Real Property Law (L. 1896, ch. 547), to set aside the conveyance as fraudulent. *Matteson v. Palscr.* 404

5. § 2476 — *Construction of Act Relating to Public Administrator in the County of New York.* Subdivision 2 of section 4 of chapter 230 of the Laws of 1898, relating to the public administrator in the county of New York and referring to assets which "shall arrive within the county of New York after his death," and section 2476 of the Code of Civil Procedure, defining the exclusive jurisdiction of Surrogates' Courts and referring to property "which has since his death come into the state and remains unadministered," must be construed as meaning that the assets must "arrive" or "come" into the state in good faith, in due course of business and not for the avowed object of securing a resident plaintiff who can prosecute a negligence action against a foreign corporation on a cause of action arising in and between residents of another state. *Hoes v. N. Y. N. H. & H. R. R. Co.* 435

6. § 2713 — *Decedent's Estate — When Title to a Portion of Property Vests Absolutely in Widow — No Obligation to Reduce it to Possession Through Administration in Surrogate's Court.* The property of an

CODE OF CIVIL PROCEDURE — Continued.

intestate leaving no minor children, to the extent and of the character specified and enumerated in section 2713 of the Code of Civil Procedure, vests absolutely in the widow, and the right of possession follows the legal title; if the administrator fails to surrender her property she is not obliged to bring him to account in a Surrogate's Court, and, when he has refused upon demand to make an inventory as required by the statute and has appropriated to his own use the property and money belonging to her, she may maintain an action of conversion against him. *Crawford v. Nassoy.* 163

7. § 2759 — *Will — Discretionary Power of Sale of Real Estate.* A testamentary power of sale, "I authorize and empower such executors who act to sell and convey any real estate of which I die seized," with no mention in the will of testator's debts, is discretionary, not imperative, and does not deprive a creditor of the right to a judicial sale of the real estate under section 2759 of the Code of Civil Procedure relating to the sale of a decedent's real property for the payment of debts. *Parker v. Beer.* 332

CODE OF CRIMINAL PROCEDURE.

1. §§ 256, 258 — *Indictment Presumed to Have Been Based upon Legal and Sufficient Evidence.* It seems, that a charge to the grand jury that "If what is charged in these affidavits shall be proven before your body, then it will be your duty to find a bill of indictment for this misdemeanor against the persons who are guilty of it," assuming it to be erroneous, does not bind the grand jury, and it cannot be presumed that it was influenced thereby, unless it deliberately ignored its duty under the statute to find an indictment only upon legal evidence, which unexplained or contradicted would warrant a conviction. (Code Cr. Pro. §§ 256, 258.) Such charge, however, is strictly correct, since "proven before your body" means proven by legal evidence and by the amount or weight of evidence that would support an indictment in any case. *People v. Glen.* 395

2. § 271 — *Reading of Affidavits to Grand Jury — Failure to Indorse Names of Witnesses upon Indictment.* The fact that affidavits were read to the grand jury by the judge alleged to have charged it, which tended to show the commission of the crime for which the defendant was subsequently indicted, is not sufficient to overcome the presumption that the indictment was based upon legal and sufficient evidence, nor is the fact that the record contains no indorsement of the names of witnesses upon the indictment, as required by section 271 of the Code of Criminal Procedure; the grand jury is presumed to have done its duty and to have found the indictment wholly upon sufficient and legal evidence received within the grand jury room. *Id.*

3. § 313 — *Crimes — Grounds of Motion for Dismissal of Indictment Specified in, Not Exclusive.* Section 313 of the Code of Criminal Procedure, relating to the grounds upon which an indictment must be set aside on motion, so far as it is intended to regulate only matters of procedure which involve no constitutional rights, is valid and must be obeyed by the courts; but to the extent that it may destroy, curtail, affect or ignore the constitutional rights of a defendant it has no force and is void. A motion to dismiss an indictment against him may be entertained on other grounds, therefore, than those specified in the section. *Id.*

4. § 528 — *Power of Court of Appeals to Reverse Judgment Entered upon Verdict of Jury.* Under the statute (Code Cr. Pro. § 528) the Court of Appeals has no power to reverse the judgment of death entered upon such verdict where it does not appear that error was committed or that justice requires a new trial. *People v. Filippelli.* 509

CO-INSURANCE.

Apportionment of loss.

See INSURANCE, 4-6.

COMPLAINT.

Erroneous dismissal of.

See TRIAL, 1.

COMPROMISE.

Devises — compromise agreement — credit of payments — construction — interest.

See CONTRACT, 9-11.

CONSTITUTIONAL LAW.

1. *Reorganization of the Police Department in the City of New York* — L. 1901, Ch. 33, Not Violative of § 16, Art. 3, of State Constitution Relating to Local Bills. Chapter 33 of the Laws of 1901, abolishing the board of police commissioners and the office of chief of police of the city of New York, and imposing the duties of those offices upon a single commissioner, is not in conflict with section 16 of article 3 of the Constitution, as embracing more than one subject which is not expressed in its title, since the act embraces but one subject, viz., the reorganization of the police force of the city, and that is not only sufficiently but is elaborately expressed in the title. *People ex rel. Devery v. Coler.* 103

2. *Not Violative of the Federal Constitution as Impairing the Obligation of Contracts.* The act is not violative of the Federal Constitution as impairing the obligation of a contract, in that it deprives the incumbent of the office of chief of police of his right to the pension to which he would have been entitled had he been permitted to serve as such officer for the requisite time, and which would have been paid out of a fund, a part of which was derived from deductions from his salary. (L. 1897, ch. 378, §§ 351-357.) 1. Because assuming, but not deciding, that the statutory provision for pensions constituted a contract with him, the legislature has the right to abolish the office, and as the act does not purport to abrogate his right to a pension, if he has any vested rights beyond the power of legislative interference, he may assert them in a proper proceeding. 2. Assuming, but not deciding, that the pension scheme was such that the legislature could not abolish the office without violating such contract, then the original legislation establishing the scheme was void, so far as it led to any such result, since one legislature cannot bind the hands or limit the powers of subsequent legislatures in matters that are strictly governmental, and what it cannot do directly it cannot do indirectly by authorizing the municipality to enter into any contract with an incumbent of the office which would have that effect; if, therefore, the legislature cannot abolish the office without violating the assumed contract, no contract exists, the obligation of which can be impaired by the act. *Id.*

3. L. 1892, Ch. 493 — *Duties Imposed upon Supreme Court Judicial, Not Administrative.* Chapter 493 of the Laws of 1892, relating to the construction of highways running through two or more towns of the same county, section 1 of which provides that upon presentation of the petition to the Supreme Court at Special Term or to the County Court of the county, "the said court shall carefully consider the facts therein alleged, and if it shall be satisfied that the said highway is necessary for the public welfare and convenience and that its continuation and construction will afford a nearer route between two populous points in two towns, than by any existing highway, then the said court may make an order directing that a notice shall be published * * * of the time and place when an application for commissioners shall be made, and at said time and place said court may make an order appointing the commissioners," etc., is not unconstitutional in that it confers non-judicial power

CONSTITUTIONAL LAW — *Continued.*

upon the Supreme Court of the state and that the procedure is non-judicial, for the lack of a judicial hearing or of a judicial form, inasmuch as it is for the court, first, to carefully consider the facts alleged in the petition. Then, if the court shall be satisfied as to the public necessity for the highway, it *may* order a notice to be published of the time and place for the making of an application for commissioners for the purpose, and, upon the return day, it *may* appoint them. An opportunity is afforded by the notice for parties to be heard, who are interested in the matter, and the court is not compelled, after hearing the parties upon the application, to proceed with the matter, if its *ex parte* consideration of the facts in the petition is differently affected, as the result of a hearing on notice. *Citizens' Sav. Bank v. Town of Greenburgh.* 215

4. *Judgment for Alimony Constitutes Property of Wife of which she Cannot Be Deprived without Due Process of Law* — L. 1900, Ch. 742, in so far as it Affects Prior Judgments for Alimony, Unconstitutional. A final judgment granting a divorce and directing the defendant to pay a certain sum per year for the plaintiff's support and the education and maintenance of her children creates and vests substantial rights which constitute property of the plaintiff, of which she cannot be deprived without due process of law (Const. art. I, § 6); and a subsequent statute (L. 1900, ch. 742), permitting the court, upon the application of either party to an action, at any time after final judgment, whether heretofore or hereafter rendered, to annul, vary or modify a direction of such judgment requiring the defendant to provide for the education and maintenance of the children of the marriage and for the support of the plaintiff, is unconstitutional in so far as it attempts to confer a power upon the court to annul, or vary, valid and final judgments rendered before the enactment of the statute. *Livingston v. Livingston.* 877

CONSTRUCTION.

Of act of Congress prescribing forum for litigation by and against national banks.

See ATTACHMENT, 2.

Of section 66 of the Code of Civil Procedure relating to attorney's lien.

See ATTORNEY AND CLIENT, 1-3.

Of contract for sale and delivery of pulp wood.

See CONTRACT, 5.

Of compromise agreement between heirs.

See CONTRACT, 10.

Tripartite agreement for sale of saloon — when "receive" should be construed as "collect."

See CONTRACT, 12.

Of paving contract.

See CONTRACT, 16.

Of will.

See DECEDENT'S ESTATE, 3.

Of conveyance by warehouse company of lots bounded by a wharf fronting on basin, reserving ownership and control thereof.

See EASEMENTS, 1.

CONTRACT.

1. *Work Done Thereunder to Be Paid for "After Certificate of Approval Should Have Been Issued by the New York Board of Fire Underwriters" — Recovery May Be Had When Issuance of Certificate Prevented by Default of*

CONTRACT — Continued.

Owner. Where it appeared, in an action brought to recover the price agreed to be paid for work done under a contract, that the plaintiff agreed to equip a factory with a system of automatic fire sprinklers, in accordance with the rules and regulations of the New York board of fire underwriters, and do all the work and furnish all the material for such system for a certain price payable "after a certificate of approval should have been issued" by such board of underwriters — that the contract was silent as to the form or substance of the certificate — that payment had been refused by defendant and the action defended upon the ground that the contract called for a certificate that would enable the defendant to secure reduced rates of insurance and that such certificate had not been furnished — that the board did make a statement certifying in effect that the plaintiff had fully complied with the contract, but refused to grant the desired certificate for the reason that the water supply of the factory was insufficient, the supply pump defective and the building beyond the reach of a fully organized paid fire department — and there was evidence tending to show that the situation was such as to render it impossible for the plaintiff to secure the certificate under the rules of the board until such objections had been removed — that defendant and his tenants were able to obtain, and were in fact offered, such reduced rates of insurance as were contemplated by the provisions of the contract with respect to the procurement of the certificate before payment, and this, too, by reason of plaintiff's work in introducing the sprinkler system into the factory, *held*, that it was reversible error to direct a verdict for defendant, since the jury might have found that it was defendant's default that prevented the issuance of the certificate, and also that, by reason of plaintiff's work, defendant was offered and could have enjoyed every advantage without the formal certificate that he could obtain or enjoy with it, and under such findings the defendant would have no reasonable ground for refusing to pay the contract price of the work and would, in equity, be bound to pay it. *N. Y. & N. H. A. S. Co. v. Andrews.* 25

2. *Evidence — Parol Evidence Inadmissible to Vary Writing.* Parol evidence is not admissible to inject into a written contract a provision as to which the writing itself is silent. *Trustees of Southampton v. Jessup.* 84

3. *Town of Southampton.* A resolution adopted by the trustees of the town of Southampton: "Resolved, that Nathan C. Jessup be and is hereby given liberty to make a roadway and to erect a bridge across the Great South Bay, commencing at the south point of Potunk Neck; thence running southerly to the beach, the said bridge to be a drawbridge of a width of not less than twenty feet, the height above the meadow three feet, and the draw to be twenty feet wide, and the said Nathan C. Jessup shall not cause any unnecessary delay to those navigating the waters of said bay," cannot be varied by parol evidence tending to show that both parties intended that the roadway should be of wood; any ambiguity arising out of the terms employed may be interpreted by such evidence; but the ambiguity must relate to a subject treated of in the writing and must arise out of words used in treating that subject; it cannot arise as to a provision concerning which the resolution itself is silent. *Id.*

4. *Injunction.* Where the grantee without permission digs earth from the lands of the grantor for the purpose of the roadway, an injunction restraining him is properly issued, since such resolution does not expressly give him that privilege and none can be implied merely from the fact that it would be convenient for him and but slightly inconvenient to the grantor if he obtained his material from such lands. *Id.*

5. *Construction — Equitable Relief.* A contract for the sale and delivery of a designated quantity of pulp wood a year, for a certain period of years, to be taken from specified premises, owned by the contracting party, who agrees not to sell the land so as to prevent the complete fulfill-

CONTRACT—Continued,

ment of the contract, and further agrees that the purchaser shall have an equitable interest in the wood for advances to be made in the progress of the work, is not an agreement which involves a mere sale of chattels, in default of which the remedy at law is adequate, but is an agreement under which the purchaser acquired certain rights in connection with the land, for the protection of which relief may be sought in equity. *St. Regis Paper Co. v. Santa Clara Lumber Co.* 149

6. *Remedy at Law—When Inadequate.* The remedy at law for the refusal of the vendor to perform such contract and furnish a specified quantity of pulp wood per year, from the designated premises, for a long term of years, which may, at the election of the purchaser, be extended for another term of the same length, is inadequate where the future price of the wood, the cost of transportation and the rate of wages throughout such period are unknown quantities, and where such future contingencies as the destruction of the timber by fire, or the taking of the land by the state in the exercise of eminent domain, contemplated by the contract, prevent an accurate computation of damages in the future. *Id.*

7. *State Printing Law—When Form of Guaranty Attached to Proposal for Contract for Legislative Printing Sufficiently Complies Therewith—Unimportant Variance in Bid—Legislative Construction.* A contract, made for legislative printing in strict accordance with the State Printing Law (L. 1901, ch. 507), in which the only defect claimed is that the proposal of the lowest bidder, to whom the contract was awarded, did not have a guaranty indorsed thereon in the precise language of section 5, requiring "a satisfactory guaranty for the proper performance of the contract," although the guaranty was in the form required by the State Printing Board as prescribed by section 10, relating to department printing, but requiring precisely the same guaranty as section 5, and was to the effect that if the bidder's proposal was accepted it would enter into a contract in compliance with it and give the necessary security, is valid, the guaranty being a sufficient, although not a literal, compliance with the requirements of the statute; since such defect must be regarded as an unimportant variance in the proposal, especially where the legislature, having in section 10 set forth a form which it regarded as a sufficient compliance with the provisions of the required guaranty, must be regarded as having construed the meaning of the words used in section 5. *People ex rel. J. B. Lyon Co. v. McDonough.* 181

8. *Intent of Statute.* The purpose of the statute was not that the performance of the final contract should be guaranteed before it was made, but that the contract or agreement involved in the proposals should be performed by entering into the final contract and giving the necessary security, thus preventing "straw" bids. Nor is a double guaranty of the performance of the final agreement required; when the second guaranty is given it supersedes the first, and such is the intent and purpose of the statute. *Id.*

9. *Devises—Compromise Agreement—Credit of Payments.* Devises under a will valid as to personal property, but void as to real estate, may, if competent to contract, agree between themselves how much in the aggregate each shall receive from the entire estate, and all payments made thereunder to each of them from the property, whether real or personal, including income from the personalty or rents from the realty, should be credited upon the sum which they agreed to accept in full. *Chauvet v. Ives.* 192

10. *Heirs—Agreement—Construction.* An heir who, by agreement with another, is to receive any surplus of the latter's share over a given sum and is to make up any deficiency if it falls below it, and who further guarantees the payment of such amount upon the distribu-

CONTRACT — Continued.

tion of the estate, simply undertakes to make up to the other any portion of the designated sum that may not be realized from the proceeds of the estate. *Id.*

11. *Interest.* One heir, who, by a compromise agreement, undertakes to make up to another any deficiency if the latter's distributive share is less than a specified amount, is not chargeable with interest in the absence of an agreement therefor, until the distribution of the estate is completed and the deficiency is ascertained and payable. *Id.*

12. *Tripartite Agreement for Sale of Saloon — When "Receive" Should Be Construed as "Collect."* Where it appears that under a tripartite agreement providing for the sale of a saloon, a brewing company agreed to pay the purchase price in consideration that all the beer sold in the conduct of the business should be of its manufacture, and in addition to the regular price of the beer sold the vendee should pay to it the sum of two dollars per barrel until the purchase price was paid, that the brewing company agreed to *receive* the money, and when the sum of \$1,200 had been received it would pay over to the vendor the whole purchase price of the saloon, it is the duty of the brewing company to collect the additional two dollars per barrel upon all beer delivered at the saloon and apply the same for the benefit of the vendor, since the word "receive" must be construed as synonymous with the word "collect" and not as indicating that the brewing company was to become a mere custodian of the money and not liable to account to the vendor until the stipulated sum was in its possession. *Maloney v. Iroquois Brewing Co.* 803

13. *Nominal Change in Ownership or Conduct of Business Does Not Affect the Rights of the Vendor.* The fact that, after the execution of the agreement, the vendee's wife continued the saloon business under a lease of the premises in her own name, does not release the brewing company from liability to the vendor, where it appears that the business was conducted by the vendee either for himself or his wife, and was a mere nominal, not a real or substantial, change in the ownership of the property or in the conduct of the business, and the company continues to enjoy the right to supply the saloon with all the beer used in the conduct of the business. *Id.*

14. *Agreement for Procurement of Legislative Action for the Purpose of Depreciating Price of Corporate Securities Void as Against Public Policy.* A contract which contemplates the procuring of legislative action for the sole purpose of depreciating the market value of the securities of a corporation and provides that any profit, arising from speculating in such securities by selling them short and covering at the anticipated decline, is to be divided between the parties, is void as against public policy and will not be enforced by the courts. *Veazey v. Allen.* 859

15. *What Constitutes a Contract of Sale by Letter.* Where a letter written to a trustee by the attorney of one who desired to purchase certain real property, offered to take the property held by the trustee at the price fixed by him in previous interviews with the purchaser, and pay the cash for it upon the delivery of the trustee's deed therefor, without warranty, the title to be taken in the name of an agent for the purchaser, which letter was answered by the attorney for the trustee, at his request, who stated that the property was held by adverse possession only and that there was no documentary title for it, and that if the purchaser would be satisfied with such title the trustee was ready to give him the usual trustee's deed without warranty, making no objection to conveying the title to the purchaser's agent, to which letter the purchaser's attorney replied, stating that such letter stated the matter just as he and the purchaser understood it and that the terms were those which the pur-

CONTRACT — Continued.

chaser wished him to accept on his behalf, and that, assuming that the consideration for the property, as to which the letter was silent, was the same as that previously named by the trustee, the terms as to the consideration were also accepted on behalf of the purchaser, such letters contain a full acceptance of the terms on behalf of the purchaser and constitute a completed contract in all of its essential details, and from that time became a binding contract upon the parties which could not be revoked by a subsequent letter of the trustee to the purchaser declining to sell or convey the property. *Gates v. Dudgeon.* 426

16. *New York, City of — Construction of Paving Contract — General Covenant to Maintain and Repair Qualified by a Specification.* A provision in a contract for paving certain streets in the city of New York which provided for the execution of the work in accordance with specifications therein referred to, requiring the contractor to "maintain the said work in good condition to the satisfaction of the commissioner of public works * * * for the period of fifteen years from the final completion and acceptance thereof; all the said work to be done in the manner and under the conditions hereinafter specified," and that the entire work will be completed "to the satisfaction of the commissioner of public works, and in substantial accordance with said specifications," should be read in connection with a specification providing "that if, at any time during the period of fifteen years from the date of the acceptance by said commissioner of the whole work under this agreement, the said work, or any part or parts thereof, or any depression, bunches or cracks shall, in the opinion of the commissioner, require repairs, and the said commissioner shall notify" the contractor "to make the repairs so required by a written notice served on the contractor, either personally or by leaving said notice at his residence or with his agent in charge of the work," the contractor "shall immediately commence and complete the same to the satisfaction of the said commissioner;" and when so read requires the contractor to make only such repairs as he should be required to make pursuant to the written notice served upon him in the manner specified. *O'Keefe v. City of New York.* 474

For speculation in stock — when void as contrary to public policy.

See APPEAL, 6.

As to whether pension system in police department of New York city constitutes a contract with incumbents.

See CONSTITUTIONAL LAW, 2.

When contractor is entitled to interest from date of presentation of claim.

See INTEREST.

Made by trustees of village afterwards merged in city — when recovery may be had thereunder against the city.

See NEW YORK (CITY OF), 1.

Specific performance.

See TRIAL, 1.

CONTRIBUTION.

Wrongdoers not entitled to compel.

See CORPORATIONS, 2.

CONVERSION.

When action of, may be maintained against administrator by widow of decedent.

See DECEDENT'S ESTATE, 1.

CORPORATIONS.

1. *Liability of Directors for Waste of Funds — Joint Tort Feasors.* The payment of the funds of an insurance company by its directors to the incorporators of a foreign insurance corporation which was not a stock corporation, and who had no interest therein that could be the subject of a sale, and who divided the proceeds among themselves in consideration of the assignment by them of their interest in the corporation, their resignation as incorporators and the substitution of such directors or their representatives in place of the incorporators, is a misappropriation of the moneys of the company, operating to waste its funds, and constitutes such directors wrongdoers, and among themselves joint tort feasors, and they are liable for the amount so paid out; the incorporators, having no property rights to transfer, or if they had, having converted the money to their own use, are also wrongdoers and among themselves joint tort feasors. *Gilbert v. Finch.* 455

2. *Equity — Wrongdoers Not Entitled to Compel Contribution or to Enforce Subrogation.* An instrument purporting to be a release of the incorporators by a receiver of the insurance company, who had brought an action against them to recover the payment, executed upon a compromise, by which he obtained a portion of his claim, but providing that "the execution of this instrument shall not affect any cause of action of the receiver against any person not named therein," does not relieve the directors of the company from liability when sued by him to recover the balance, upon the ground that if required to return the money paid to the incorporators they would become in equity entitled to subrogation to the rights of the plaintiff and entitled to recover it, and that the release would operate to deprive them of this right, since being wrongdoers equity would not compel contribution or enforce subrogation. *Id.*

3. *Instrument in Effect a Covenant Not to Sue Does Not Release Joint Tort Feasors.* Nor will the defendants be relieved from liability upon the ground that the so-called release was a settlement of the entire claim, and that its effect was to discharge them, upon the theory that all the defendants and the incorporators were joint tort feasors, since, assuming them to be such, the instrument containing an express reservation of the right to sue any person not named therein, is in effect a covenant not to sue the incorporators, and a covenant not to sue does not release joint tort feasors. *Id.*

4. *Directors Not Relieved from Liability by Release Granted by Themselves to a Co-director.* The fact that prior to the appointment of the receiver mutual releases were exchanged between the insurance company and one of the defendants, upon the settlement of an action brought by him against the company to recover a large amount claimed to be due him, does not relieve them from liability, since even if the release by the company were authorized by its board of directors they could not waste its funds and then relieve themselves from liability by a release granted by themselves to a co-director. *Id.*

Franchise tax — computed on actual, not par value of stock — taxable capital — rolling stock of railroad corporations — non-taxable capital — pledged stock of foreign corporations — anticipated dividends — bills receivable — coal and supplies — stock of domestic transportation company.

See TAX, 1-5.

COUNSEL.

Improper summing up of.

See TRIAL, 2, 3.

COUNTIES.

Enforcement of judgment requiring board of supervisors to levy tax and pay over proceeds to county treasurer to be invested for a town.

See MANDAMUS.

COUNTY COURTS.

Jurisdiction to make an order appointing commissioners under section 84 of the Highway Law.

See HIGHWAYS.

COURT OF APPEALS.

Dismissal of appeal, when question of fact might be involved in decision upon the merits.

See APPEAL, 1.

Appeal to, from an order of Appellate Division involving question of fact, must be dismissed.

See APPEAL, 4.

When objection to improper summing up by counsel cannot be considered by.

See APPEAL, 5.

When question whether Statute of Limitations barred plaintiff's claim not reviewable in.

See APPEAL, 7.

Power of, to reverse judgment of death, entered upon verdict of jury.

See CRIMES, 12.

Improper statement of counsel in summing up not subject to review unless proper exception is taken — denial of motion to withdraw a juror not reviewable by.

See TRIAL, 3, 4.

COURTS.

Power of, to set aside assignee's sale upon summary application.

See ASSIGNMENT.

Duties imposed upon Supreme Court by statute relating to construction of highways judicial, not administrative.

See CONSTITUTIONAL LAW, 3.

COVENANTS.

In paving contract — general covenant to maintain and repair qualified by a specification.

See CONTRACT, 16.

Instrument in effect a covenant not to sue does not release joint tortfeasors.

See CORPORATIONS, 3.

CRIMES.

1. *Use of Carbonic Acid Gas in the Manufacture of Soda Water in a Tenement House Not a Misdemeanor under Section 389, Penal Code.* The fact that one who manufactured soda water in the basement of a tenement house used carbonic acid gas in the process and that such gas is a "compressed gas," will not support his conviction for a misdemeanor in violating section 389 of the Penal Code as it stood before the amendment of 1902 (L. 1902, ch. 486) prohibiting, among other things, the manufacture of compressed gases or of any explosive articles or compounds, where there is no evidence that the carbonic acid gas used was manufactured on the premises and none to show that soda water is an explosive or its manufacture dangerous. *People v. Lichtman.* 68

2. *Murder.* Under an indictment for murder in the first degree the prosecution may prove facts to bring the case within any of the provisions of the statute defining that crime. *People v. Sullivan.* 122

CRIMES — Continued.

the deceased was not justifiable homicide, it was nevertheless correct, since the absence of intent to take life or work grievous bodily injury would not make the subsequent act of the defendant justifiable homicide, but only reduce his offense to manslaughter. *Id.*

DAMAGES.

In action of ejectment for breach of condition in deed.

See EJECTMENT, 5.

DEATH.

Presumption of — facts authorizing, must be proved to establish the fact of death.

See EVIDENCE, 1, 2.

Record of board of health inadmissible to show cause of death.

See EVIDENCE, 3.

DEBTOR AND CREDITOR.

Action to charge heirs at law and devisees with debts of their decedent.

See DECEDENT'S ESTATE, 2-4.

Action against personal representative of deceased joint debtor.

See PLEADING.

DECEDENT'S ESTATE.

1. *When Title to a Portion of Property Vests Absolutely in Widow — Code Civ. Pro. § 2713 — No Obligation to Reduce it to Possession Through Administration in Surrogate's Court.* The property of an intestate leaving no minor children, to the extent and of the character specified and enumerated in section 2713 of the Code of Civil Procedure, vests absolutely in the widow, and the right of possession follows the legal title; if the administrator fails to surrender her property she is not obliged to bring him to account in a Surrogate's Court, and, when he has refused upon demand to make an inventory as required by the statute and has appropriated to his own use the property and money belonging to her, she may maintain an action of conversion against him. *Crawford v. Nassoy.* 163

2. *Action to Charge Heirs at Law and Devisees with Debts of their Decedents — Grantees under Trust Deed Not Liable as Heirs at Law.* Where, in an action brought by a creditor under sections 1843, 1860 of the Code of Civil Procedure against the heirs at law of two deceased sisters to recover a deficiency arising upon the foreclosure, after their death, of a mortgage made by them in their lifetime to secure the payment of their note to plaintiffs' assignor, the children of one of the co-debtors did not derive title to their mother's real property by descent or devise, but as grantees under a conveyance of all her property made in her lifetime to a trustee, whereby she reserved to herself the income thereof during her life, and on her death gave the remainder to her children, they are not liable for their mother's debt as the heirs at law of her real property, in the absence of proof that the conveyance was made with intent to defraud her creditors, and that at the time of the execution thereof the mortgaged property was not sufficient to pay plaintiff's note, which proof can only be adduced in an action brought by one creditor in behalf of himself and all other creditors, under section 282 of the Real Property Law (L. 1896, ch. 547), to set aside the conveyance as fraudulent. *Matteson v. Palser.* 404

3. *Same — Construction of Will — When it Does Not Suspend Power of Alienation for More than Two Lives in Being.* Where, in such action, some of the defendants are liable as heirs at law of a deceased aunt only in the event that her will devising her real property to others should be held invalid because it provided that all of her property should be divided equally among the children of a deceased sister, and that her

DECEDENT'S ESTATE — *Continued.*

executors should take care of and manage her estate and pay the income thereof to such nephews and nieces until the youngest survivor of them should arrive at the age of thirty years, when such executors, or the survivor of them, should divide and pay over the residue of the estate to such nephews and nieces, to the survivors or survivor of them, such will is not invalid, because the ownership of the personal property and the power of alienation of the real property might be suspended for five lives, in the absence of proof that any of such beneficiaries were under the age of thirty years at the time of the death of testatrix, and, therefore, the testatrix cannot be held to have died intestate, and no recovery can be had against any of the defendants as the heirs at law of her real property. *Id.*

4. *Same* — *Failure to Recover against Defendant as Heir at Law Does Not Preclude Recovery against him as Devisee.* Notwithstanding the fact that plaintiff in such action sought to have the will of one of the co-debtors held invalid and to hold all of the defendants liable as her heirs at law as if she had died intestate, such claim is not inconsistent with and does not prevent a recovery against one of such defendants as a devisee under the will for such a proportion of the debt as he would have been liable to pay as an heir at law, although as a devisee he would have been liable for a larger amount, and so long as plaintiff is satisfied with such recovery it should not be disturbed when the only change on a new trial would be to increase its amount. *Id.*

Devises — compromise agreement — credit of payments — heirs — agreement — construction — interest.

See CONTRACT, 9-11.

Superiority of lien of legacy charged upon real estate to that of mortgage given by residuary devisee — neglect of legatee to enforce payment of legacy.

See EQUITY.

Surrogate's decree may be collaterally attacked for fraud and collusion — bringing assets of deceased non resident into the state in order to procure letters of administration — action by administrator cannot be entertained by the courts.

See EXECUTORS AND ADMINISTRATORS, 1.

When the proceeds of an assignable policy become a part of the insured's estate.

See INSURANCE, 7.

Action against personal representative of deceased joint debtor.

See PLEADING.

Discretionary power of sale of real estate.

See WILL, 1.

DEED.

Construction of conveyance by warehouse company of lots bounded by a wharf fronting on a basin, reserving ownership and control thereof — general rules as to lots exhibited on map and bounded by street not applicable — rights of grantee.

See EASEMENTS, 1-3.

Condition subsequent — breach of condition — when acquiescence does not operate as an estoppel.

See EJECTMENT, 1-3.

DEFINITIONS.

Definition of term "whole insurance."

See INSURANCE, 4.

DELIBERATION.

And premeditation of crime of murder.

See CRIMES, 5.

DEVISEES.

Compromise agreement.

See CONTRACT, 9-11.

Action to charge, with debts of their decedent.

See DECEDENT'S ESTATE, 2-4.

DIRECTORS.

Of corporation — liability of, for waste of funds — not relieved from liability by release granted by themselves to a co-director.

See CORPORATIONS, 1-4.

DIVORCE.

Judgment for alimony constitutes property of wife of which she cannot be deprived without due process of law.

See CONSTITUTIONAL LAW, 4.

Decree of, obtained by wife in another state, upon grounds not recognized in this state, competent evidence against her in action for dower in husband's property acquired subsequent to divorce.

See EVIDENCE, 4.

Action for separation — counterclaim that plaintiff had husband living — when voidable marriage not a ground for dismissal of complaint.

See HUSBAND AND WIFE, 1-3.

DOWER.

Decree of divorce obtained by wife in another state, upon grounds not recognized in this state, competent evidence against her in action for dower in husband's property acquired subsequent to divorce.

See EVIDENCE, 4.

DRAFTED MEN.

Not liable for moneys received under the void Drafted Men's Act.

See BONDS, 1.

DRAFTS.

Negligent certification of draft — money paid by mistake — estoppel — payment.

See BANKING, 1-3.

EASEMENTS.

1. *Construction of Conveyance by Warehouse Company of Lots Bounded by a Wharf Fronting on Basin, Reserving Ownership and Control Thereof.* It seems, that a conveyance by a wharf and warehouse corporation authorized to construct docks, piers, basins, etc., of certain lots bounded by a wharf, in front of which was a navigable basin, artificially constructed and owned by the company, which furnished access from the wharf to the harbor, and which at the time of the conveyance was practically free from piers and all other obstructions as represented on a map filed in the county clerk's office and referred to therein for the purpose of identifying the particular lots sold, their location, situation and boundaries, and which conveyance expressly reserved to the company the ownership and control of both the wharf and the basin with the right to

EASEMENTS — *Continued.*

charge surrounding owners of warehouses for the use of the same, does not require the grantor to keep the basin entirely free from piers as it appeared on the map and as it was when the grant was made for all future time, and confers no right upon the grantee to prevent the subsequent construction or extension of a pier in front of its property without its consent, although its means of access to the basin are to some extent impaired thereby. *Indus Wharf Brewing Co. v. Bklyn. W. & W. Co.* 167

2. *General Rule as to Lots Exhibited on Map and Bounded by Street Not Applicable.* It seems, that the representation of the lots on the map as bounded by a street or space does not render applicable in its full scope and meaning the general rule that where lots are sold which are exhibited on a map referred to in the deed and bounded by a street, the purchaser obtains an easement in the street, because the grantor expressly reserved the ownership, use and control of the designated street with the right to receive the rents and profits. *Id.*

3. *Rights of Grantee.* It seems, that the grantee has an easement of access to the water from which he cannot be entirely cut off, but it is subject to reasonable regulation and control by the grantor, and if in its interest and that of the public it undertakes to construct or extend a pier, the effect of which will be to reduce the grantee's means of access to the water, the latter must show that such act is unreasonable and a substantial infringement upon his rights in order to entitle him to an injunction. *Id.*

When railroad company not liable for consequential damages resulting from erection of steel viaduct upon which its trains are run in and through city street.

See RAILROADS.

EJECTMENT.

1. *Deed — Condition Subsequent.* A clause in a deed of land to a city providing that the land "is to be used for the purpose of building a city hall thereon, and this conveyance is made upon the express condition that in case the said plot of ground above described shall ever cease to be used by said Long Island City for a city hall or other similar city buildings, then, and in that case, the said plot of land shall revert back to the parties hereto of the first part as if this conveyance had not been made," creates a condition subsequent and requires the grantee to comply therewith within a reasonable time. *Trustees of Union College v. City of New York.* 38

2. *Breach of Condition.* The failure of the grantee to erect a city building thereon within ten years after the acceptance of the deed, which was found by the trial court to be a reasonable time, worked a breach of the condition and the land reverts to the grantor. *Id.*

3. *When Acquiescence Does Not Operate as an Estoppel.* The fact that the grantor did not assert its right of re-entry until fifteen years after its right to do so had accrued, does not operate as an estoppel or preclude it from insisting upon a forfeiture and from claiming possession of the premises. *Id.*

4. *Demand of Performance Unnecessary.* The grantor is not compelled to demand performance before commencing an action of ejectment to recover the land. *Id.*

5. *Damages.* In such an action where the defendant is in possession the plaintiff is entitled by way of damages to the rents and profits or the value of the use and occupation of the land from the commencement of the action. *Id.*

ENGINEERS.

Operating boilers within city of New York — when license from police department not necessary.

See NEW YORK (CITY OF), 3.

EQUITY.

Superiority of Lien of Legacy Charged upon Real Estate to that of Mortgage Given by Residuary Devisee — Neglect of Legatee to Enforce Payment of Legacy. Legacies payable "out of my said farm by my executors," which farm, together with the personal property, was devised to the testator's son as residuary devisee after the payment of such legacies and other charges, but could not be sold or disposed of during the life of the widow without her consent, are liens upon the farm and are superior to the lien of a mortgage given by the devisee, during the life of the widow, upon his interest in the property although by his acceptance of the devise he became personally liable for the payment, and the legatees neglected to proceed against him, where it does not appear that the mortgagee has given actual notice to them of the mortgage, has requested them to proceed against the devisee or his estate in order to discharge the lien, and that he has suffered actual damage which could have been avoided by timely proceedings upon their part against the devisee. *Conkling v. Weatherwax.* 43

When equitable relief may be sought for violation of contract.

See CONTRACT, 5, 6.

Wrongdoers not entitled to compel contribution or to enforce subrogation.

See CORPORATIONS, 2.

ESTOPPEL.

Liability for negligent certification of draft.

See BANKING, 2.

When acquiescence in breach of condition of deed does not operate as an estoppel.

See EJECTMENT, 3.

EVIDENCE.

1. *Presumption of Death — Code Civ. Pro. § 841.* It seems, that section 841 of the Code of Civil Procedure, relating to the presumption of death in certain cases, relates only to a case where the right to the possession of real property depends upon the life of a third person and has no application to a person who is the owner of the property. *Matter of Board of Education, City of New York.* 321

2. *Facts Authorizing Presumption of Death Must Be Proved to Establish the Fact of Death.* It seems, that in order to establish the heirship of petitioners who claimed to be the widow and heirs at law of the owner of property sold under condemnation proceedings, and as such entitled to an award made therein, proof of no will and that more than seven years have elapsed since he had been seen or heard from by members of his family is insufficient; there must be other evidence of his death, which, however, may be established by presumptive as well as by direct evidence, but facts must be proved which raise the presumption of death. *Id.*

3. *Life Insurance — Record of Board of Health Inadmissible to Show Cause of Death.* The general statute requiring the registration of vital statistics and making the record *prima facie* evidence of the facts therein set forth (L. 1885, ch. 270, § 3, subd. 5) applies to questions arising under its provisions so far as they involve public rights, but does not change the common-law rule of evidence in controversies of private parties growing out of contracts; therefore, a copy of a record of a city board of health

EVIDENCE—Continued.

embodying vital statistics cannot be proved in an action upon a life insurance policy for the purpose of showing that a material statement made by an applicant for insurance as to the cause of her mother's death was false. *Beglin v. Metropolitan L. Ins. Co.* 374

4. *Husband and Wife—Decree of Divorce Obtained by Wife in Another State, upon Grounds Not Recognized in this State, Competent Evidence against her in Action for Dower in Husband's Property Acquired Subsequent to Divorce.* In an action of dower brought by one claiming to be the widow of decedent an exemplified copy of a decree of divorce, obtained by the plaintiff in Massachusetts upon the ground of extreme cruelty, in an action in which decedent was personally served with the summons, but did not, either personally or by attorney, appear therein, or submit himself to the jurisdiction of the Massachusetts court, is competent evidence tending to defeat her claim that she is the widow of the decedent and entitled to dower in the real estate acquired by him after the decree; since the plaintiff cannot be heard to impeach a decree or judgment which she, herself, has procured to be entered in her own favor. *Starbuck v. Starbuck.* 503

Parol evidence inadmissible to vary writing.

See CONTRACT, 2, 3.

Credibility—jury may believe part, and reject part, of testimony.

See CRIMES, 4.

Sufficiency of, to support conviction for murder.

See CRIMES, 11.

When employment of child under fourteen years of age constitutes evidence of negligence.

See NEGLIGENCE, 5, 6.

EXCEPTIONS.

Improper summing up of counsel—no proper exception raising question.

See APPEAL, 5.

Improper statement of counsel in summing up—insufficient exception.

See TRIAL, 3.

EXECUTORS AND ADMINISTRATORS.

1. *Surrogate's Decree May Be Collaterally Attacked for Fraud and Collusion—Bringing Assets of Deceased Non resident into the State in Order to Procure Letters of Administration—Action by Administrator Cannot Be Entertained by the Courts.* A surrogate's decree granting to the public administrator of the county of New York letters of administration upon the estate of a non-resident who left no property within the state, but whose assets were alleged to have come therein since his death, may be attacked collaterally in an action of negligence brought by the administrator against a foreign corporation to recover damages for an accident occurring in another state, which resulted in his intestate's death, where it appears that there was collusion and legal fraud in procuring the decree by reason of the fact that property belonging to the intestate of trifling value was brought from another state for the purpose of laying a foundation for making an application for letters so that the action might be prosecuted in this state, and under such circumstances the courts of this state have no jurisdiction to entertain the action. *Hoes v. N. Y., N. H. & H. R. R. Co.* 435

2. *Construction of Act Relating to Public Administrator in the County of New York and Section 2476 of the Code of Civil Procedure.* Subdivision

EXECUTORS AND ADMINISTRATORS — Continued.

2 of section 4 of chapter 230 of the Laws of 1898, relating to the public administrator in the county of New York and referring to assets which "shall arrive within the county of New York after his death," and section 2476 of the Code of Civil Procedure, defining the exclusive jurisdiction of Surrogates' Courts and referring to property "which has since his death come into the state and remains unadministered," must be construed as meaning that the assets must "arrive" or "come" into the state in good faith, in due course of business and not for the avowed object of securing a resident plaintiff who can prosecute a negligence action against a foreign corporation on a cause of action arising in and between residents of another state. *Id.*

Action by administratrix as *quasi* trustee for beneficiaries of death benefit.

See ASSOCIATIONS, 5.

When title to a portion of property of decedent vests absolutely in widow — no obligation to reduce it to possession through administration.

See DECEDENT'S ESTATE, 1.

When executor and trustee, under a power given by will, may delegate execution of such power.

See WILL, 2.

FACTORIES.

Employment of children under fourteen years of age in — civil liability of employers.

See NEGLIGENCE, 5, 6.

FIRE INSURANCE.

Apportionment of loss — definition of term "whole insurance" — percentage co-insurance — face value of all policies on same property constitutes the whole insurance — method of apportionment.

See INSURANCE, 4-6.

FORECLOSURE.

When sale cannot be postponed by a judgment which is practically a perpetual stay of proceedings.

See MORTGAGE.

FORMER ADJUDICATION.

When judgment in an action is not a bar to another action for same cause brought by a co-defendant therein against some of the defendants in first action.

See JUDGMENT, 1.

FRANCHISE TAX.

Computed on actual, not par value of stock — taxable capital — rolling stock of railroad corporations — non-taxable capital — pledged stock of foreign corporations — anticipated dividends — bills receivable — coal and supplies — stock of domestic transportation company.

See TAX, 1-5.

FRAUD.

Surrogate's decree may be collaterally attacked for.

See EXECUTORS AND ADMINISTRATORS, 1.

GRAND JURY.

Charge to, not properly authenticated, cannot be considered on appeal — indictment presumed to have been based upon legal and sufficient evidence — reading of affidavits to — failure to indorse names of witnesses upon indictment.

See CRIMES, 8-10.

GRANTS.

Construction of conveyance by warehouse company of lots bounded by a wharf fronting on basin, reserving ownership and control thereof.

See EASEMENTS, 1-8.

GUARANTY.

When form of, attached to proposal for contract for legislative printing sufficiently complies with State Printing Law.

See CONTRACT, 7, 8.

HEIRS.

Compromise agreement.

See CONTRACT, 10, 11.

Action to charge heirs at law and devisees with debts of their decedents — grantees under trust deed not liable as heirs at law — failure to recover against defendant as heir at law does not preclude recovery against him as devisee.

See DECEDENT'S ESTATE, 2-4.

HIGHWAYS.

Order Appointing Commissioners under Section 84, Highway Law. Where a notice and petition in proceedings instituted under the Highway Law (L. 1890, ch. 568, § 84) to lay out a highway states all of the facts required by the statute, the County Court has jurisdiction to make an order appointing commissioners, the effect of which is an adjudication that the persons appointed are eligible; the fact that it does not affirmatively appear in the order that such commissioners were "disinterested freeholders," residents of the town, but not of the county, which the statute requires them to be, is not a defect upon the face of the proceedings affecting the jurisdiction of the court. *Matter of Baker.* 249

What constitutes dedication of lands of residence park association — trespass.

See ASSOCIATIONS, 1.

Duties imposed upon Supreme Court by statute relating to construction of highways judicial, not administrative.

See CONSTITUTIONAL LAW, 8.

HOMICIDE.

Committed by person engaged in quarrel with another — when it constitutes murder — when manslaughter.

See CRIMES, 13.

HUSBAND AND WIFE.

1. *Action for a Separation.* Where it appears, in an action for separation and alimony brought by a wife against her husband, that prior to a ceremonial marriage between plaintiff and defendant in 1871 plaintiff had married another, with whom she lived about two years, when he disappeared; that long before her marriage to defendant she was unable to learn anything of her first husband's whereabouts by diligent inquiry; that she had believed him to be dead for a period of more than five years prior to her marriage to defendant; that he did die in 1878, which fact was communicated to plaintiff and defendant shortly thereafter; and that, with knowledge thereof, they continued to live together as man and wife, holding themselves out as such to the world for a period of about eleven years and until the year 1889 — these facts, together with a finding that defendant had abandoned plaintiff and refused and neglected to support her, furnish sufficient support for a judgment of separation and for an allowance of alimony. *Taylor v. Taylor.* 266

2. *Counterclaim that Plaintiff Had Husband Living.* Where the answer contains a counterclaim that the plaintiff had a husband living at

HUSBAND AND WIFE—*Continued.*

the time of her marriage with defendant, but under the reply she is entitled to offer proof of a later contract of marriage than the ceremonial marriage, a motion for judgment annulling the latter marriage, at the beginning of the trial, is properly denied. *Id.*

3. *When Voidable Marriage Not a Ground for Dismissal of the Complaint.* Where defendant moved, after the plaintiff had rested, to dismiss the complaint upon the ground that plaintiff's first husband was alive at the time of her marriage to defendant, and the only evidence thereof was in plaintiff's reply, which, taken as a whole, brought the marriage to defendant within the statutory definition of "voidable marriages" (L. 1896, ch. 272, § 4), the motion is properly denied. *Id.*

Judgment for alimony constitutes property of wife, of which she cannot be deprived without due process of law.

See CONSTITUTIONAL LAW, 4.

Decree of divorce obtained by wife in another state, upon grounds not recognized in this state, competent evidence against her in action for dower in husband's property acquired subsequent to divorce.

See EVIDENCE, 4.

INDICTMENT.

Grounds of motion for dismissal of, specified in section 313 of Code of Criminal Procedure, not exclusive—indictment presumed to have been based upon legal and sufficient evidence—failure to indorse names of witnesses upon indictment.

See CRIMES, 7, 9, 10.

INSURANCE.

1. *Marine—Constructive Total Loss.* Under a policy of marine insurance, providing, *first*, "The said loss or damage to be estimated according to the true and actual cash value of the said property at the place of destination on the day of the disaster; * * * but fruit and vegetables, and other articles perishable in their own nature, are free of particular average," and, *second*, "It is understood that there can be no abandonment of the subject insured; nor shall the acts of the insurers or their agents in recovering, saving or disposing of the property hereby insured, be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party," where the property insured, consisting of a cargo of fruit and vegetables, was shipped in a canal boat which was sunk and part of the cargo was recovered in a damaged condition, shipped to the insured and sold by him, the amount realized being but slightly in excess of the handling and selling charges and was less than the sum expended by the insurer in raising and shipping the cargo, not including therein the expenses of the sale, the latter is liable for a constructive loss on the whole of the articles insured. *Devitt v. Providence Washington Ins. Co.* 17

2. *When Abandonment Not Necessary to Constitute a Constructive Loss.* The fact that the policy provides that "there can be no abandonment of the subject insured" does not prevent a constructive total loss, since that provision is found in connection with the further provision, "nor shall the acts of the insurers or their agents in recovering, saving or disposing of the property hereby insured be considered a waiver or an acceptance of abandonment," the effect of which is to prevent the action of the insurer in taking possession of the property and interfering to save it from being held as the acceptance of an abandonment. *Id.*

3. *Life—When Owner of Stolen Policy May Maintain Action for New Paid-up Policy.* Where a policy of life insurance contains a clause that

INSURANCE — *Continued.*

if the policy should become void in consequence of a default in the payment of premiums for three years, the company would issue, in lieu of such policy, a new paid-up policy for a certain proportion of the original policy, "provided that the said policy should be surrendered duly receipted within six months of the date of default in payment of premiums on said policy," the insured, who defaulted in the payment of premiums after seven annual premiums had been paid, and from whom the policy had been stolen, may maintain an equitable action for a decree directing the company to issue a new paid-up policy upon proof that the policy was stolen without his fault; that he has used due diligence to reclaim it, but has been unable to do so; that he is still the owner thereof and has never transferred or assigned his interest therein, and that he has performed all the conditions and requirements on his part, except the surrendering of the stolen policy; and it is reversible error to sustain a demurrer to the complaint in such action, upon the ground that plaintiff did not plead that he was willing to execute some instrument that would operate in law as a surrender of the policy and a discharge of the defendant's liability, since the court has power, before rendering final judgment, to require the plaintiff to execute such paper if it should be necessary for the protection of the defendant. *Wilcox v. Equitable L. Assur. Socy.* 50

4. *Fire — Apportionment of Loss — Definition of Term "Whole Insurance."* The words "whole insurance," as used in an apportionment clause of a fire insurance policy providing that the company shall not be liable for a greater proportion of any loss than the amount insured by its policy should bear to the whole insurance on the property, means the face value of the policy together with the face value of all policies issued by other insurers upon the same property, and for the purpose of apportioning a loss, all other insurance is to be included whether made by another company alone or by a contract between it and the insured by which in case of a partial loss each stands part as a co-insurer. *Farmers' Feed Co. v. Scottish Union Ins. Co.* 241

5. *Percentage Co-insurance — Face Value of All Policies on Same Property Constitutes the Whole Insurance.* Where the insured subsequently procures policies upon the same property in other companies, which provide for the payment to him of not exceeding a specified sum in case of a total loss, or in case the loss is partial and his insurance amounts to eighty per cent of the cash value of the property, but he agrees that if both loss and insurance are each less than eighty per cent to take less than the amount of his loss, if a loss occurs, and the loss and insurance are each less than eighty per cent, the whole amount of insurance effected by the policies is not the amount of insurance assumed by such companies under the circumstances, but is the largest sum which under any circumstances they can be required to pay, and in such case the insured becomes a co-insurer for the difference between that amount and the face value of the policies; the fact that the whole amount of insurance upon the property is in excess of his loss does not entitle him to full indemnity since the loss and the insurance being less than eighty per cent of the cash value, by the additional policies, he agreed to stand part of it himself, and the amount of his share of the loss should be included in apportioning the loss of the prior company. *Id.*

6. *Method of Apportionment.* Where, upon the submission of a controversy, it appears that the defendant insured plaintiff's property to an amount not exceeding \$60,000, which amount was subsequently reduced to \$42,500, the policy containing the usual apportionment clause; that subsequently he procured additional insurance from other companies to an amount not exceeding \$17,500 in all; that each of the policies issued by such companies, in addition to an apportionment clause, contained a percentage co-insurance clause as follows: "In consideration of the pre-

INSURANCE — Continued.

mum for which this policy is issued it is expressly stipulated that in the event of loss this company shall be liable for no greater proportion thereof than the sum hereby insured bears to 80 per cent of the cash value of the property described herein at the time when such loss shall happen, nor more than the proportion which this policy bears to the total insurance;" that a loss occurred appraised at \$45,321.18; that at the time of the loss the cash value of the property was \$124,660 — the "whole insurance" effected by the additional policies is \$17,500, not \$7,952.84, the amount of the insurance assumed by the other companies as determined by the following proportion: As 80 per cent of the cash value, \$99,728 : \$17,500 :: \$45,321.18 : the amount required, the plaintiff becoming a co-insurer for the difference; the defendant's liability under its apportionment clause is not

42,500

$\frac{50,452.84}{\$42,500 + \$7,952.84} \times 45,321.18 = \$38,177.26$

thus giving no effect to the amount of insurance assumed by the plaintiff as co-insurer, but is $\frac{\$42,500}{\$60,000} \times \$45,321.18 = \$32,102.50$, the balance of the

loss being chargeable to the plaintiff and the other companies. *Id.*

7. *Life — When the Proceeds of an Assignable Policy Become a Part of the Insured's Estate.* The title to a policy of life insurance issued by a company, which is neither a fraternal nor a mutual benefit association, to the insured "(the beneficiary under this policy) or to the legal representatives or assigns of said beneficiary," upon an application in which he directed that the insurance should be paid "to whom I may direct in my will," where he bequeaths to his wife the balance due on the policy after the satisfaction of a debt, to secure which it had been assigned, and appoints her executrix, vests in the widow, not as a beneficiary under the policy, but as executrix; as a specific legatee, however, she is entitled to the proceeds, except as against creditors of the estate. *Leonard v. Harney*.

352

Mutual benevolent society — action by administratrix as *quasi* trustee for beneficiaries of death benefit — payment to its own trustee does not release society from liability — when issuance of certificate showing member entitled to benefit is not a condition precedent to recovery — admissions of liability.

See ASSOCIATIONS, 5-8.

Life — record of board of health inadmissible to show cause of death — false statement in application for policy.

See EVIDENCE, 3.

INTEREST.

When Contractors Are Entitled to, from Date of Presentation of Claim. In an action upon a contract for work done and materials furnished, which provided that plaintiffs were to be allowed a specific price for each item of labor or materials furnished, they are entitled upon recovery to interest upon their claim from the time of their demand for its payment. *Sweeny v. City of New York*.

414

Compromise agreement between heirs — when interest not chargeable.

See CONTRACT, 11.

JUDGMENT.

1. *When Judgment in an Action Is Not a Bar to Another Action for Same Cause Brought by a Co-defendant Therein against Some of the Defendants in First Action.* A judgment, obtained by a residuary legatee in an action against the trustees under a will for an accounting and to recover a personal judgment against them for the loss incurred by the estate through their neglect of duty, is not a bar to a similar action brought, upon substantially the same facts, by another residuary legatee

JUDGMENT — *Continued.*

against such trustees for a similar judgment, although the plaintiff in the latter action was made a defendant in the former action and was served with the summons therein, where he neither appeared nor answered in the action and his rights were not litigated or adjudged therein and where his cause of action would not have been a defense to the former action, and if pleaded and proved would not have prevented the judgment that was rendered therein, although his rights could have been determined by such judgment; since the rule that a former judgment determines all the issues litigated and which might have been litigated should be limited to such matters as might have been used in the former action as a defense to an adverse claim made by the plaintiff therein or by one of the co-defendants therein of the plaintiff in the latter action. *Earle v. Earle*. 480

2. *Action by Residuary Legatee against Trustees — May Be Commenced before Death of Life Tenant.* Such action is not prematurely brought because the life tenant was living at the time the action was commenced, where the plaintiff, as residuary legatee, had such an interest in the fund set apart for the life tenant that an action would lie to compel the trustees to account for any misuse of the fund and to make good any loss or waste thereof caused by their neglect. *Id.*

Requiring board of supervisors to levy tax and pay over proceeds to county treasurer to be invested for a town, enforcement of —.

See MANDAMUS.

Which is practically a perpetual stay of proceedings — when foreclosure sale cannot be postponed by.

See MORTGAGE.

JURISDICTION.

Of court over purchaser at assignee's sale.

See ASSIGNMENT.

Bringing assets of deceased non-resident into the state in order to procure letters of administration — when action by administrator cannot be entertained by the courts.

See EXECUTORS AND ADMINISTRATORS, 1.

Of County Court to make order appointing commissioners under section 84 of the Highway Law.

See HIGHWAYS.

Portion of East river within jurisdiction of city of New York.

See NEW YORK (CITY OF), 2.

JURORS.

Motion to withdraw juror rests in discretion of trial court.

See TRIAL, 4.

JURY.

Grand — charge to, not properly authenticated cannot be considered on appeal — indictment presumed to have been based upon legal and sufficient evidence — reading of affidavits to — failure to indorse names of witnesses upon indictment.

See CRIMES, 8-10.

LABOR LAW.

Employment of children under fourteen years of age in factory — civil liability of employer.

See NEGLIGENCE, 5, 6.

LEASE.

By residence park association — dedication of lands as street — reservation of power to regulate trade contemplates reasonable regulation — when sales to lessee by unlicensed dealer cannot be restrained.

See ASSOCIATIONS, 1-4.

LEGACY.

Superiority of lien of legacy charged upon real estate to that of mortgage given by residuary devisee — neglect of legatee to enforce payment of legacy.

See EQUITY.

LIEN.

Attorney's — enforcement, after settlement by the parties before trial, by equitable action — Code remedy not exclusive — what must and may be shown in such action.

See ATTORNEY AND CLIENT, 1-3.

LIFE INSURANCE.

False statement in application.

See EVIDENCE, 3.

When owner of stolen policy may maintain action for new paid-up policy.

See INSURANCE, 3.

When the proceeds of an assignable policy become a part of the insured's estate.

See INSURANCE, 7.

LIMITATION OF ACTIONS.

Question of fact.

See APPEAL, 7.

MANDAMUS.

Enforcement of Judgment Requiring Board of Supervisors to Levy Tax and Pay over Proceeds to County Treasurer to Be Invested for a Town. A judgment directing the board of supervisors of Delaware county (1) to levy and collect from the taxable property of the county the sum of \$2,019.16, with interest; (2) to deposit the sum with the county treasurer for the benefit of the town of Walton, the same to be invested by him in pursuance of the provisions of chapter 907 of the Laws of 1869, as amended; (3) that upon the receipt of the money the county treasurer invest the same for the benefit of the said town, in accordance with the law, and to keep the same invested, is not complied with by merely levying and collecting the sum specified, and without giving any directions for the use of the money as a sinking fund for the benefit of the town, either in the warrant for the collection of taxes or in any other way, paying it over to the county treasurer, so that it became intermingled with the general fund and was used for county expenses; and the town may enforce the judgment by a writ of peremptory mandamus to compel the board of supervisors to again levy and collect the sum and pay it over to the county treasurer for the benefit of the town. *People ex rel. Town of Walton v. Bd. of Suprs.* 297

MANSLAUGHTER.

When homicide committed by person engaged in quarrel with another constitutes.

See CRIMES, 13.

MARINE INSURANCE.

Constructive total loss — when abandonment not necessary to constitute a constructive total loss.

See INSURANCE, 1, 2.

MASTER AND SERVANT.

1. *Negligence—Liability of Master When Safe Place to Work in Becomes Unsafe—When Foreman Is Not a Fellow-servant.* Where, upon the trial of an action to recover damages for the death of a laborer alleged to have been caused by the negligence of his employers, it appears that, at the time of the accident which caused his death, the defendants were contractors engaged in excavating material for railroad ballast from a large bank composed of ashes and cinders in which solid lumps of lime paste, unfit for ballast, were occasionally found and were removed either by loosening them from the top and prying them off, or by undermining them and causing them to fall down, and when partially undermined became unsafe and liable to fall at any time—that such work was in charge of a competent foreman, who was authorized to hire men and set them at work, discharge them and direct the work—that the decedent was hired by the foreman several weeks after the commencement of the work and assigned to duty with the night gang, with which he worked one night and part of the next, shoveling loose ashes and cinders into cars, until he reached a point some distance from the place where he began to work and where he had never been before—that in a dark place, dimly lighted by a distant lamp, a heavy mass of lime paste, partially undermined and cracked at the top, projected several feet from the bank and was eight or ten feet from the ground beneath it, in which condition it had been left by the day gang three days before, with no support under it and with nothing to give warning of the danger, all of which was known to the foreman, who was familiar with the situation—that when this place was reached the decedent was ordered by the foreman, without any warning of the dangerous situation, to get a pick and go under the projection and loosen material for the next load; that decedent, having no knowledge of the danger, went to work under the projection as directed, and while so engaged was crushed to death by the fall thereof.

Held, that the defendants were liable; that it was their duty to inspect the progress of the work with such care and diligence as the nature of the materials and the danger of the work required, and when any place became dangerous, because any of such lumps of lime paste became undermined and, therefore, liable to fall, to give warning of such danger to their servants having no knowledge thereof and required to work at such place; that although the defendants had the right to delegate and intrust the conduct of such duty to a competent foreman, they could not do so without being liable for the manner in which it was performed, and whoever in fact performed or attempted to perform such duty stood for the defendants as their *alter ego*, and what he did had the same effect in law as if they had done it in person;

Also *held*, that the fact that, as to some of his duties, the foreman was a fellow-servant of decedent at the time of his injury and death did not relieve the defendants from liability, since, in hiring decedent and setting him at work, the foreman was not discharging a servant's, but a master's duty, and decedent did not become a fellow-servant of the foreman until the latter had hired him and set him at work, and it was at this time, when the relation of master and servant first began, that the law required due diligence on the part of the defendants to furnish a safe place for decedent to work; a sufficient period of time having elapsed between the day when the dangerous situation arose and the day when decedent was put to work at the dangerous place to enable the defendants by careful inspection to discover the danger, they were chargeable with knowledge thereof, independent of the knowledge of the foreman. *Simone v. Kirk.* 7

2. *Assumption of Obvious Risk.* The rule of the assumption of obvious risks does not rest wholly upon an implied agreement of the employee, but on an independent act of waiver evidenced by his continuing in the employment with a full knowledge of all the facts. *Drake v. Auburn City Ry. Co.* 466

MASTER AND SERVANT — *Continued.*

8. *Negligence.* Where it appears upon the trial of an action for negligence that plaintiff's intestate, who was performing his duties as a conductor upon defendant's railroad, was killed by coming in contact with a tree near the track, that he had been over the road about one hundred and sixty times as a conductor and about forty or fifty trips as a motorman, and consequently was familiar with the situation, the submission to the jury of the question whether it was negligence upon the part of defendant to maintain its road so near the line of the tree as would cause the injury complained of is reversible error, since by continuing in his employment with full knowledge of all the facts he must be deemed to have assumed an obvious risk. *Id.*

Employment of children under fourteen years of age in factory — civil liability of employer.

See NEGLIGENCE, 5, 6.

MISDEMEANOR.

Use of carbonic acid gas in the manufacture of soda water in a tenement house not a misdemeanor.

See CRIMES, 1.

MISTAKE.

Money paid by.

See BANKING, 1.

Of law — drafted men not liable for moneys received under the void Drafted Men's Act.

See BONDS, 1.

MONOPOLY.

Statute authorizing residence park association to establish rules regulating trade upon grounds thereof does not authorize a monopoly.

See ASSOCIATIONS, 2-4.

MORTGAGE.

Foreclosure Action — When Sale Cannot Be Postponed by a Judgment Which Is Practically a Perpetual Stay of Proceedings. Where, upon the trial of an action to foreclose a mortgage brought by the receivers of a loan association upon which some amount was due, the court declined to find the amount due or to award a judgment of foreclosure and sale for any portion of the mortgage debt, upon the theory that, owing to litigation pending and uncertainty as to the amount of the assets of the association, it was then impossible for the receivers to state even approximately the amount of the dividends which the defendants would be entitled to receive upon their stock in the association, and postponed the foreclosure and sale until that fact could be ascertained upon the final accounting of the receivers and directed that a judgment should be entered for its ascertainment as soon as the assets of the association were sufficiently liquidated for the purpose, the judgment must be reversed; the plaintiffs are entitled to a sale of the premises to secure the payment of their mortgage debt and cannot be deprived of it unless some adverse dominating equity requires it and the proofs bring the case within the exceptional class. *Breed v. Ruoff.* 340

Superiority of lien of legacy charged upon real estate to that of mortgage given by residuary devisee — neglect of legatee to enforce payment of legacy.

See EQUITY.

MOTION.

For dismissal of indictment — grounds of, specified in section 3.8 of Code of Criminal Procedure, not exclusive.

See CRIMES, 7.

MUNICIPAL CORPORATIONS.

Bonds—validity of, in hands of *bona fide* holders affected only by fundamental defect in creation—town highway bonds—sale of, at their face value, exclusive of interest, in violation of statute, does not affect their validity in the hands of innocent purchasers.

See BONDS, 2, 3.

Slight defect in crosswalk—exemption from liability.

See NEGLIGENCE, 1.

Village bonds—resolution to purchase water works system—language sufficient to authorize issue of bonds for such purpose.

See VILLAGES.

MURDER.

Trial for—question for jury—witnesses—credibility—jury may believe part, and reject part, of testimony—premeditation—deliberation.

See CRIMES, 2-5.

Sufficiency of evidence—power of Court of Appeals to reverse judgment entered upon verdict of jury—homicide committed by person engaged in quarrel with another—when it constitutes murder—when manslaughter—charge to jury reviewed and held not erroneous.

See CRIMES, 11-14.

NEGLECTANCE.

1. *Municipal Corporation—Slight Defect in Crosswalk—Exemption from Liability.* A municipal corporation is not chargeable with negligence when an accident happens to a traveler by reason of a slight defect in a street from which danger was not reasonably to be anticipated as likely to happen, such as a rounded depression in a flagged sidewalk about four inches deep, thirty-four inches long and about twelve inches wide, caused by the wheels of heavily-laden trucks which had worn off the corners of two of the flagstones where they came together, upon the edge of which depression he stepped, his foot slipping in, causing him to fall, and which had existed for a period of from six to twelve months, and was so slight as not to suggest to the mind of an ordinarily careful and prudent man that it was dangerous. *Hamilton v. City of Buffalo.* 72

2. *Injury to One Stealing Ride upon Railroad Train.* A railroad company owes no duty to one stealing a ride upon one of its trains except to refrain from wantonly or unnecessarily injuring him, and where in an action of negligence brought against it by the trespasser for injuries alleged to have been received in being kicked off from the train there is no evidence upon which the jury could find that the defendant's servants or any of them assaulted the plaintiff and inflicted the injury, a judgment entered upon a verdict in his favor must be reversed. *Johnson v. N. Y. C. & H. R. R. Co.* 79

3. *Contributory.* Where, upon the trial of an action for negligence, it appears that the plaintiff's intestate, who was an employee of contractors excavating under defendant's street railway, over which cars were continually passing, was working in a trench, that he was struck by a car, which he saw as it approached, that he leaned back so as to be out of its way, that there was plenty of room in the trench for him to remain at a safe distance from the car as it passed, and had he done so no injury would have resulted, but he raised up, and bringing his face nearer to the car, came in collision with the step, he must be deemed guilty of such contributory negligence as will prevent a recovery in the action. *Riddle v. Forty-second Street, etc., R. R. Co.* 827

4. *When Street Railway Company Not Liable for Death of Person Kicked or Thrown from Car by Motorman and Struck by Another Car While Cross-*

NEGLIGENCE — *Continued.*

ing the Trucks. Where a bright boy about fourteen years of age, with no physical defect that affected his strength or activity, who was riding upon the front platform of an electric car, was thrown or kicked from the car by the motorman, and, picking himself up slowly, walked lamely back a short distance and proceeded to cross over the tracks and while in the act of crossing the second or further track was struck by a car running at a high rate of speed and received such injuries that he subsequently died therefrom, the railway company is not liable for his death, where it appears that the place where he was injured was well lighted by electric lights and that the car, itself, well lighted up, was about 125 feet distant at the time he attempted to cross the tracks, and there was no evidence proving, or tending to prove, that he either looked or listened for the approach of a car before crossing the second track, or evidence that would justify the inference that he was so injured by being thrown from the car on which he had been riding that he was unable to use his powers of sight and hearing or to judge of the peril of the situation. *Pinder v. Bklyn. Heights R. R. Co.* 519

5. *Employment of Children under Fourteen Years of Age in Factory* — *Effect of Labor Law* (L. 1897, ch. 415, § 70). Section 70 of the Labor Law (L. 1897, ch. 45), prohibiting the employment of a child under the age of fourteen years in any factory in this state, in effect declares that a child under the age specified presumably does not possess the judgment, discretion, care and caution necessary for the engagement in such a dangerous avocation, and, therefore, is not as a matter of law chargeable with contributory negligence or with having assumed the risks of the employment. *Marino v. Lehmaier.* 530

6. *Civil Liability of Employer.* The fact that the statute provides that a violation of it shall constitute a misdemeanor, and, therefore, the proprietor of a factory is criminally liable for the employment of children under the prescribed age, does not relieve him from civil liability for injuries sustained by such an employee; and in an action therefor, such employment is in and of itself some evidence of negligence in cases where the accident could not have happened but for the employment. *Id.*

7. *Injury Resulting from Overcrowded Platform of Horse Car* — *When Negligence of Railroad Company a Question of Fact.* When a carrier of passengers fails to provide either seats or standing room inside its cars so that a passenger must stand on the platform in order to ride at all and the company permits him to ride there, it cannot allow the platform to become so crowded that he is liable to be pushed off by an employee in operating the car without presenting a question of fact for the jury as to its negligence in the premises. *Cattano v. Met. St. Ry. Co.* 565

8. *Same.* Where it appears in an action of negligence that the plaintiff's intestate was a passenger on one of defendant's horse cars, the seats of which were occupied, and in the aisles of which there was no standing room; that he, with seven others, was riding on the front platform, which "apparently had no room for anybody else;" that the car was going very fast on a down grade, and the driver, in his efforts to apply the brakes, "made room for himself" by backing and pushing and thus jostled the crowd and shoved the people around so that the decedent was thrown off and instantly killed, the questions of negligence on the part of the defendant and freedom from contributory negligence on the part of the decedent are properly submitted to the jury. *Id.*

9. *Contributory.* The decedent is not, as matter of law, chargeable with contributory negligence, because with knowledge of its overcrowding he stood upon the platform, in the absence of evidence that he was ever on a street car before or that he was acquainted with the grade, the method of operating the brakes or with any fact aside from the crowded condition of the platform which might expose him to danger, since the

NEGLIGENCE — Continued.

defendant is presumed to have known the situation as it actually existed and the decedent had the right to rely upon defendant to exercise a high degree of care to make the platform safe and secure for his occupation. *Id.*

In certification of draft.

See BANKING, 1.

Liability of master when safe place to work in becomes unsafe — when foreman is not a fellow-servant.

See MASTER AND SERVANT, 1.

Assumption of obvious risk.

See MASTER AND SERVANT, 2, 3.

NEGOTIABLE INSTRUMENTS.

When maker of note signed by him as "trustee" is not personally liable.

See BILLS, NOTES AND CHECKS.

Validity of town highway bonds.

See BONDS, 2, 3.

NEW YORK (CITY OF).

1. *Contract Made by Trustees of Village Merged in City by Chapter 378 of Laws of 1867 — When Recovery May Be Had Thereunder against the City.* Where, upon the trial of an action brought against the city of New York upon a contract made in December, 1897, by the trustees of an incorporated village for sprinkling the streets thereof from May 1 to October 1, 1898 — which village, under the provisions of the Greater New York charter (L. 1897, ch. 378), had become merged with the city on the 1st day of January, 1898 — it appeared from the complaint and the opening of plaintiff's counsel, *first*, that, pursuant to the Greater New York charter, a budget had been prepared by the proper authorities of the village, which included the contract in question, and that taxes had been accordingly levied; and, *second*, that the contract had been fully performed, with defendant's knowledge, it is reversible error to dismiss the complaint upon the ground that the trustees of the village had no right to make the contract, the performance of which extended beyond their fixed terms of office. The plaintiff should have been allowed to try his case and to prove, if he could, that the contract sued upon had been, in good faith, made and included in the budget for the year 1898; that the taxes required under the budget had been levied for 1898, and that the work called for by the contract had been fully performed. *Schwan v. City of New York.* 32

2. *Jurisdiction — Portion of East River Within Jurisdiction of City of New York.* That portion of the East river flowing between the old cities of New York and Brooklyn was part of the old city of New York, and that city having been consolidated with the outlying municipalities by the present charter, such portion of the East river is clearly within the jurisdiction of the present city. *People v. Prillen.* 67

3. *Provisions of Charter (L. 1901, Ch. 466, § 343) Requiring Engineers Operating Boilers within the City to Have License from Police Department Are Not Applicable to Engineers of Boilers Temporarily within the City.* Section 343 of the present charter of the city of New York (L. 1901, ch. 466), providing that it shall not be lawful for any person to operate or use steam boilers therein specified without having a certificate of qualification therefor issued by the police department of the city must be read in connection with section 342, providing for the inspection of boilers within the city, and so read relates only to steam boilers permanently located and in use in the city of New York; and where a foreign corporation, engaged,

NEW YORK (CITY OF) — *Continued.*

under a contract with the United States government, in removing an island from the East river, had steam boilers for the prosecution of the work temporarily within the limits of the city, an engineer employed by such corporation is not liable to arrest and conviction under section 343 for operating such boilers without having a certificate of qualification issued by the police department of the city. *Id.*

4. *When Assessments Objected to Must Be Reviewed by Board of Revision of Assessments.* Under section 950 of the charter of the city of New York (L. 1897, ch. 378) where an assessment is made by the board of assessors and objections thereto are interposed in writing, and the assessment is not altered so as to satisfy the objectors, the board has no power to declare the assessment confirmed, but under section 944 it is its duty to present such objections with the proposed assessment to the board of revision of assessments for its review. *People ex rel. Decker v. McCue.* 347

5. *Civil Service — Veteran Volunteer Fireman Discharged from Municipal Position for "Lack of Work" Not Entitled to Reinstatement or to Position Held by Another Employee.* A bridgetender employed upon a bridge connecting the boroughs of Brooklyn and Queens, in the city of New York, who was discharged by the commissioner of bridges for "lack of work," because the bridge was taken down that a new one might be constructed, is not entitled to a peremptory writ of mandamus commanding the commissioner of bridges to reinstate him in such position or to "transfer him to duty in any other branch of the civil service of the city in such position as he may be fitted to fill, receiving the same compensation therefor," upon the ground "that he is an honorably discharged volunteer fireman" and as such "entitled to the protection of the Civil Service Law, and that his discharge from his position was not for incompetency or misconduct," where the taking down of the bridge in question made unnecessary the positions of bridgetenders during the work of reconstruction and such positions were wholly abolished, since the granting of such mandamus would result either in imposing upon the city the expense of maintaining the relator in his position, when the work for which he had been employed had ceased, or in removing some employee, perhaps better or equally qualified and faithful, to make a vacancy for the relator. *People ex rel. Chappel v. Lindenthal.* 524

Reorganization of the police department in — L. 1901, ch. 83, not violative of section 16 of article 3 of State Constitution relating to local bills — not violative of the Federal Constitution as impairing the obligation of contracts.

See CONSTITUTIONAL LAW, 1, 2.

Construction of paving contract — general covenant to maintain and repair qualified by a specification.

See CONTRACT, 16.

When contractors are entitled to interest from date of presentation of claims.

See INTEREST.

When railroad company not liable for consequential damages resulting from erection of steel viaduct upon which its trains are run in and through city street.

See RAILROADS.

NONSUIT.

When dismissal of complaint constitutes.

See APPEAL, 6.

NOTES.

When maker of note signed by him as "trustee" is not personally liable.

See **BILLS, NOTES AND CHECKS.**

OFFICERS.

Public — When Statutes Imposing Duties upon, Are Not Required to Be Literally Performed in Unessential Particulars. Where a statute or ordinance requires the performance by public officers of a certain specified act, or that it shall be performed in a certain specified manner, they must at least substantially comply with these requirements to render their acts valid. But such a statute or ordinance is not required to be literally performed in unessential particulars, where there has been a substantial compliance which answers the purpose or intent of the statutory requirements. *People ex rel. J. B. Lyon Co. v. McDonough.* 181

ORDERS.

Jurisdiction of County Court to make order appointing commissioners under section 84 of the Highway Law.

See **HIGHWAYS.**

PARTIES.

One claiming title adverse and in hostility to plaintiff and his cotenants in action of partition may be made a party.

See **PARTITION, 1.**

Joinder of personal representative of deceased joint debtor as defendant in action against survivors.

See **PLEADING.**

PARTITION.

1. *One Claiming Title Adverse and in Hostility to Plaintiff and his Cotenants May Be Made a Party.* Where the complaint in an action for the partition of lands, most of which are wild and unoccupied, alleges that the plaintiff and certain of the defendants named are the owners of all the lands as joint tenants or tenants in common; that other defendants claim some right or interest in particular lands adverse to the plaintiff and his cotenants, but that the right or interest so claimed is unknown to the plaintiff, and while it does not allege that these defendants are tenants in common with the plaintiff, it, in substance, states that they are not, and are either in possession of certain islands or make some claim to them in hostility to the plaintiff, and such defendants answer putting in issue most if not all the allegations of the complaint, and in addition plead that they were in possession under claim of title hostile to the plaintiff, and that they or their grantors had been so in possession for more than twenty years prior to the commencement of the action, a judgment entered upon a dismissal of the complaint as to such defendants, upon the ground that they were not proper parties defendant and that the issues presented by the pleadings could not be tried in that form of action, is erroneous and must be reversed. *Satterlee v. Kobbe.* 91

2. *Insufficient Reservation of Growing Crop by Referee at the Sale.* Evidence that the referee in a partition sale stated "that there would be a claim against the place of about 28 acres of rye, besides that the one that put in the rye was to take his; he furnished all the seed and was to take his share of the seed out of the other half," is not sufficient to establish a reservation of the rye from the sale; at the most it was a statement that the purchaser would take title to the rye, subject to some claim, and in an action for conversion, the submission to the jury of the question whether such reservation was made is reversible error. *Banta v. Merchant.* 292

PAYMENT.

Of draft — whether warranted, question for jury.

See **BANKING**, 8.

PENAL CODE.

1. § 183 — *Question for Jury.* Where, upon the trial of an indictment charging but a single crime, that of murder in the first degree, the case is submitted to the jury in two aspects, that the deceased was killed with a deliberate and premeditated design to effect his death, and that he was killed by the defendant while the latter was engaged in the perpetration of a felony or an attempt to commit one, they are not so inconsistent as to render it improper to submit both to the jury for determination, since proof either that the defendant killed the deceased with a deliberate and premeditated design to effect his death, or while the defendant was engaged in the commission of a felony or an attempt to commit a felony, though "without any design to effect death," which phrase does not constitute an absence of intent an essential ingredient of the murder, establishes the crime charged, and the only issue to be decided by the jury is whether the defendant is guilty of that crime as it is defined by the statute (Penal Code, § 183). *People v. Sullivan.* 122

2. § 389 — *Crimes—Use of Carbonic Acid Gas in the Manufacture of Soda Water in a Tenement House Not a Misdemeanor.* The fact that one who manufactured soda water in the basement of a tenement house used carbonic acid gas in the process and that such gas is a "compressed gas," will not support his conviction for a misdemeanor in violating section 389 of the Penal Code as it stood before the amendment of 1902 (L. 1902, ch. 486) prohibiting, among other things, the manufacture of compressed gases or of any explosive articles or compounds, where there is no evidence that the carbonic acid gas used was manufactured on the premises and none to show that soda water is an explosive or its manufacture dangerous. *People v. Lichtman.* 63

PENSIONS.

In police department of city of New York.

See **CONSTITUTIONAL LAW**, 2.

PLEADING.

Action against Personal Representative of Deceased Joint Debtor—Insolvency of the Survivors or their Inability to Pay Must Be Alleged—Code Civ. Pro. § 758. While section 758 of the Code of Civil Procedure, relating to proceedings upon the death or disability of a party, provides that "the estate of a person or party jointly liable upon contracts with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter," that section does not dispense with the necessity of appropriate averments and proof of the insolvency, or the inability to pay, of the surviving joint debtors when joining the personal representatives of the decedent as defendants in an action upon the contract. The section creates the legal liability, but does not change the rule of procedure, and the remedy to enforce the liability is to be pursued upon such pleadings and proofs as would show an equitable reason for joining the personal representatives of a deceased joint debtor as defendants in an action against the survivors upon the contract. *Potts v. Dounce.* 335

When complaint in action for specific performance improperly dismissed.

See **TRIAL**, 1.

POLICE.

Reorganization of police department in city of New York.

See **CONSTITUTIONAL LAW**, 1, 2.

POLICY.

Of life insurance — when owner of stolen policy may maintain action for new paid-up policy.

See INSURANCE, 3.

POWERS.

Discretionary power of sale of real estate.

See WILL, 1.

When executor and trustee under a power given by will may delegate execution of such power.

See WILL, 2.

PRACTICE.

Attorney's lien — enforcement after settlement by the parties — Code remedy not exclusive — what must and may be shown in such action.

See ATTORNEY AND CLIENT, 2, 3.

PREMEDITATION.

Murder.

See CRIMES, 5.

PRESUMPTION.

Of death.

See EVIDENCE, 1, 2.

PRINTING LAW.

When form of guaranty attached to proposal for contract for legislative printing sufficiently complies therewith — unimportant variance in bid — legislative construction — intent of statute.

See CONTRACT, 7, 8.

PUBLIC OFFICERS.

When statutes imposing duties upon, are not required to be literally performed in unessential particulars.

See OFFICERS.

PUBLIC POLICY.

Void contract for speculation in stock.

See APPEAL, 6.

Agreement for procurement of legislative action for the purpose of depreciating price of corporate securities void as against public policy.

See CONTRACT, 14.

QUESTION OF FACT.

When might be involved in decision upon the merits, appeal from reversal by Appellate Division will be dismissed.

See APPEAL, 1.

Appeal from order of Appellate Division involving, must be dismissed.

See APPEAL, 4.

As to whether Statute of Limitations barred claim.

See APPEAL, 7.

As to liability of maker of note signed by him as "trustee."

See BILLS, NOTES AND CHECKS.

When negligence of railroad company a question of fact.

See NEGLIGENCE, 7, 8.

RAILROADS.

New York and Harlem Railroad Company Not Liable for Consequential Damages Resulting from Erection of Steel Viaduct upon Which its Trains Are Run in and through Fourth Avenue in New York City—L. 1892, Ch. 339. The New York and Harlem Railroad Company, which, previous to the enactment of chapter 339 of the Laws of 1892, had acquired, as against the abutting owners, the right to maintain its railroad through, in and along Fourth avenue in the city of New York, through a subway constructed for that purpose, is not liable to an abutting owner for damages that may have been suffered by him by reason of any interference with his easements of light, air and access caused by the change in grade of the railroad and the erection of the steel viaduct upon which its trains are now run, the grade having been changed and viaduct erected by the state under and in pursuance of such statute for the purpose of compelling the company to operate its railroad thereon in order to give the public the use of the whole of the surface of Fourth avenue, which was impossible before the erection of the viaduct, since the state had the power to enact the statute and to change the grade of the railroad and construct the viaduct for the purpose of improving the street for the benefit of the public, without compensation to the abutting owners, and the railroad company having previously acquired the right to move its trains over the street, which could not be taken from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built. *Muhlker v. N. Y. & H. R. R. Co.* 549

Negligence—assumption of obvious risk.

See MASTER AND SERVANT, 2, 3

Injury to one stealing ride upon train.

See NEGLIGENCE, 2.

Contributory negligence of person injured by street car.

See NEGLIGENCE, 3.

When street railway company not liable for death of person kicked or thrown from car by motorman and struck by another car while crossing the tracks.

See NEGLIGENCE, 4.

Injury resulting from overcrowded platform of horse car—when negligence of railroad company a question of fact—contributory negligence.

See NEGLIGENCE, 7-9.

Franchise tax—computed on actual, not par value of stock—taxable capital—rolling stock—pledged stock of foreign corporation—anticipated dividends—bills receivable—coal and supplies—stock of domestic transportation company.

See TAX, 1-5.

REAL PROPERTY.

What constitutes a contract of sale by letter.

See CONTRACT, 15.

Construction of conveyance by warehouse company of lots bounded by a wharf fronting on basin reserving ownership and control thereof.

See EASEMENTS, 1-3.

Deed—condition subsequent—breach of condition—when acquiescence does not operate as an estoppel—demand of performance unnecessary—damages.

See EJECTMENT, 1-5.

REAL PROPERTY — *Continued.*

Superiority of lien of legacy charged upon real estate to that of mortgage given by residuary devisee — neglect of legatee to enforce payment of legacy.

See EQUITY.

Presumption of death of owner.

See EVIDENCE, 1, 2.

One claiming title adverse and in hostility to plaintiff and his cotenants may be made a party in an action of partition.

See PARTITION, 1.

Insufficient reservation of growing crop by referee at partition sale.

See PARTITION, 2.

When railroad company not liable for consequential damages resulting from erection of steel viaduct upon which its trains are run in and through city street.

See RAILROADS.

Discretionary power of sale of.

See WILL, 1.

RECORDS.

When record of board of health inadmissible to show cause of death.

See EVIDENCE, 3.

RELEASE.

Directors not relieved from liability for waste of funds of corporation by release granted by themselves to a co-director.

See CORPORATIONS, 4.

REMEDIES.

Attorney's lien — Code remedy not exclusive.

See ATTORNEY AND CLIENT, 3.

Remedy at law for violation of contract — when inadequate.

See CONTRACT, 6.

RES ADJUDICATA.

When judgment in an action is not a bar to another action for same cause brought by a co-defendant therein against some of the defendants in first action.

See JUDGMENT, 1.

RESERVATION.

Of growing crop by referee at partition sale — when insufficient.

See PARTITION, 2.

SALE.

Assignee's — when may be set aside upon summary application.

See ASSIGNMENT.

Tripartite agreement for sale of saloon — nominal change in ownership or conduct of business does not affect the rights of the vendor.

See CONTRACT, 12, 13.

What constitutes a contract of sale by letter.

See CONTRACT, 15.

SALE — *Continued.*

Foreclosure — when cannot be postponed by a judgment which is practically a perpetual stay of proceedings.

See MORTGAGE.

Partition — insufficient reservation of growing crop by referee.

See PARTITION, 2.

SEPARATION.

Action for — counterclaim that plaintiff had husband living — when voidable marriage not a ground for dismissal of complaint.

See HUSBAND AND WIFE, 1-3.

SESSION LAWS.

1. 1869, Ch. 907 — *Mandamus — Enforcement of Judgment Requiring Board of Supervisors to Levy Tax and Pay Over Proceeds to County Treasurer to Be Invested for a Town.* A judgment directing the board of supervisors of Delaware county (1) to levy and collect from the taxable property of the county the sum of \$2,019.16, with interest; (2) to deposit the sum with the county treasurer for the benefit of the town of Walton, the same to be invested by him in pursuance of the provisions of chapter 907 of the Laws of 1869, as amended; (3) that upon the receipt of the money the county treasurer invest the same for the benefit of the said town, in accordance with the law, and to keep the same invested, is not complied with by merely levying and collecting the sum specified, and without giving any directions for the use of the money as a sinking fund for the benefit of the town, either in the warrant for the collection of taxes or in any other way, paying it over to the county treasurer, so that it became intermingled with the general fund and was used for county expenses; and the town may enforce the judgment by a writ of peremptory mandamus to compel the board of supervisors to again levy and collect the sum and pay it over to the county treasurer for the benefit of the town. *People ex rel. Town of Walton v. Bd. Suprs. Delaware Co.* 297

2. 1877, Ch. 466 — *General Assignment Act — Assignment for Creditors — When Assignee's Sale May Be Set Aside upon Summary Application.* Under the General Assignment Act (L. 1877, ch. 466, as amd.) the conversion, disposition and distribution of an assigned estate is, from its inception, a proceeding in court, and the administration of the estate, though made by the assignee who, in the first instance at least, is selected by the assignor, is really made by the court; a purchaser at an assignee's sale, therefore, makes himself a party to the proceeding and subjects himself to the jurisdiction of the court, which, in a proper case, without action brought, has power upon a summary application in the proceeding to set the sale aside and vacate it. *Matter of Sheldon.* 287

3. 1883, Ch. 278 — *Residence Park Association — Statute Authorizing Association to Establish Rules Regulating Trade upon Grounds Thereof Does Not Authorize a Monopoly.* A statute (L. 1883, ch. 278) authorizing a residence park association to purchase and deal in provisions and other commodities for supplying lessees and visitors and to maintain stores and shops for that purpose and empowering the association to authorize others to engage in such pursuits in the park, and to make and maintain regulations therefor, cannot be construed so as to give the association, its agents or licensees, the exclusive privilege of dealing in merchandise and supplies within the limits of the park, since the power to regulate does not authorize the creation of a monopoly. *Thousand Island Park Assn. v. Tucker.* 203

4. 1885, Ch. 270 — *Evidence — Life Insurance — Record of Board of Health Inadmissible to Show Cause of Death.* The general statute requiring the registration of vital statistics and making the record *prima facie* evidence of the facts therein set forth (L. 1885, ch. 270, § 3, subd. 5)

SESSION LAWS — Continued.

applies to questions arising under its provisions so far as they involve public rights, but does not change the common-law rule of evidence in controversies of private parties growing out of contracts; therefore, a copy of a record of a city board of health embodying vital statistics cannot be proved in an action upon a life insurance policy for the purpose of showing that a material statement made by an applicant for insurance as to the cause of her mother's death was false. *Beglin v. Metropolitan L. Ins. Co.* 374

5. 1890 — *Ch. 568 — Highway Law — Order Appointing Commissioners under Section 84.* Where a notice and petition in proceedings instituted under the Highway Law (L. 1890, ch. 568, § 84) to lay out a highway, states all of the facts required by the statute, the County Court has jurisdiction to make an order appointing commissioners, the effect of which is an adjudication that the persons appointed are eligible; the fact that it does not affirmatively appear in the order that such commissioners were "disinterested freeholders," residents of the town, but not of the county, which the statute requires them to be, is not a defect upon the face of the proceedings affecting the jurisdiction of the court. *Matter of Baker.* 249

6. 1892, *Ch. 339 — Railroads — New York and Harlem Railroad Company Not Liable for Consequential Damages Resulting from Erection of Steel Viaduct upon Which its Trains Are Run in and through Fourth Avenue in New York City.* The New York and Harlem Railroad Company, which, previous to the enactment of chapter 339 of the Laws of 1892, had acquired, as against the abutting owners, the right to maintain its railroad through, in and along Fourth avenue in the city of New York, through a subway constructed for that purpose, is not liable to an abutting owner for damages that may have been suffered by him by reason of any interference with his easements of light, air and access caused by the change in grade of the railroad and the erection of the steel viaduct upon which its trains are now run, the grade having been changed and viaduct erected by the state under and in pursuance of such statute for the purpose of compelling the company to operate its railroad thereon in order to give the public the use of the whole of the surface of Fourth avenue, which was impossible before the erection of the viaduct, since the state had the power to enact the statute and to change the grade of the railroad and construct the viaduct for the purpose of improving the street for the benefit of the public, without compensation to the abutting owners, and the railroad company having previously acquired the right to move its trains over the street, which could not be taken from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built. *Muhlker v. N. Y. & Harlem R. R. Co.* 549

7. 1892, *Ch. 493 — Town Highway Bonds — Sale of, at their Face Value, Exclusive of Interest, in Violation of Statute, Does Not Affect their Validity in the Hands of Innocent Purchasers.* Town bonds issued under chapter 493 of the Laws of 1892, providing for the construction of highways running through two or more towns of the same county, "executed by the supervisor and town clerk" thereof and delivered to the said commissioners to be paid out by them, at not less than par, in liquidation of the said damages, etc., or, at their option, "to be sold at not less than par and the proceeds thereof applied as aforesaid" (§ 6), become complete obligations when executed. Their delivery to the commissioners has no relation to their creation. Their sale "flat," that is, without taking into account the interest which had accrued upon them, by such commissioners, which, if not fraudulent, was a deviation from the authority they possessed, constitutes an irregular exercise of the power to dispose of the bonds but does not affect their validity in the hands of innocent holders for value. *Citizens' Sav. Bank v. Town of Greenburg.* 215

SESSION LAWS — Continued.

8. *Idem* — *Constitutional Law — Duties Imposed upon Supreme Court Judicial, Not Administrative.* Chapter 498 of the Laws of 1892, relating to the construction of highways running through two or more towns of the same county, section 1 of which provides that upon presentation of the petition to the Supreme Court at Special Term or to the County Court of the county, "the said court shall carefully consider the facts therein alleged, and if it shall be satisfied that the said highway is necessary for the public welfare and convenience, and that its continuation and construction will afford a nearer route between two populous points in two towns than by any existing highway, then the said court may make an order directing that a notice shall be published * * * of the time and place when an application for commissioners shall be made, and at said time and place said court may make an order appointing the commissioners," etc., is not unconstitutional, in that it confers non-judicial power upon the Supreme Court of the state and that the procedure is non-judicial, for the lack of a judicial hearing or of a judicial form, inasmuch as it is for the court, first, to carefully consider the facts alleged in the petition. Then, if the court shall be satisfied as to the public necessity for the highway, it *may* order a notice to be published of the time and place for the making of an application for commissioners for the purpose, and, upon the return day, it *may* appoint them. An opportunity is afforded by the notice for parties to be heard, who are interested in the matter, and the court is not compelled, after hearing the parties upon the application, to proceed with the matter, if its *ex parte* consideration of the facts in the petition is differently affected, as the result of a hearing on *Id.*

9. 1892, Ch. 664 — *Mistake of Law — Drafted Men Not Liable for Moneys Received under the Void Drafted Men's Act.* Money loaned to a town upon the security of bonds issued under chapter 664 of the Laws of 1892 for the relief of certain persons drafted into the military service of the United States under the act of Congress passed March 3, 1863, known as the Conscription Act, and paid over by the county treasurer to such drafted men, cannot be recovered from them by the bondholders, after the statute has been declared void by the courts of this state, where no fraud is alleged and no question of a trust in favor of or against any one is involved, since the money was received by the drafted men under a mutual mistake of law and under a claim of right, and they are under no liability to restore it to the bondholders. *Newburgh Sav. Bank v. Town of Woodbury.* 55

10. 1896, Ch. 272 — *When Voidable Marriage Not a Ground for Dismissal of the Complaint.* Where, in an action for a separation, defendant moved, after the plaintiff had rested, to dismiss the complaint upon the ground that the plaintiff's first husband was alive at the time of her marriage to defendant, and the only evidence thereof was in the plaintiff's reply, which, taken as a whole, brought the marriage to defendant within the statutory definition of "voidable marriages" (L. 1896, ch. 272, § 4), the motion is properly denied. *Taylor v. Taylor.* 266

11. 1896, Ch. 547 — *Real Property Law — Action to Charge Heirs at Law and Devisees with Debts of their Decedents — Grantees under Trust Deed Not Liable as Heirs at Law.* Where, in an action brought by a creditor under sections 1843-1860 of the Code of Civil Procedure against the heirs at law of two deceased sisters to recover a deficiency arising upon the foreclosure, after their death, of a mortgage made by them in their lifetime to secure the payment of their note to plaintiffs' assignor, the children of one of the co-debtors did not derive title to their mother's real property by descent or devise, but as grantees under a conveyance of all her property made in her lifetime to a trustee, whereby she reserved to herself the income thereof during her life, and on her death gave the remainder to her children, they are not liable for their mother's debt as the heirs at law

SESSION LAWS — Continued.

of her real property, in the absence of proof that the conveyance was made with intent to defraud her creditors, and that at the time of the execution thereof the mortgaged property was not sufficient to pay plaintiff's note, which proof can only be adduced in an action brought by one creditor in behalf of himself and all other creditors, under section 232 of the Real Property Law (L. 1896, ch. 547), to set aside the conveyance as fraudulent. *Matteson v. Pulser.* 404

12. 1896, Ch. 908 — *Tax Law — Franchise Tax Computed on Actual, not Par Value of Stock.* Under sections 182 and 190 of the Tax Law (L. 1896, ch. 908) the actual, not the par, value of the capital stock of a corporation employed within this state is the basis for computing the franchise tax. *People ex rel. N. Y. C. & H. R. R. Co. v. Knight.* 255

13. 1897, Ch. 378 — *New York City Charter — Contract Made by Trustees of Village Merged in City — When Recovery May Be Had Thereunder against the City.* Where, upon the trial of an action brought against the city of New York upon a contract made in December, 1897, by the trustees of an incorporated village for sprinkling the streets thereof from May 1 to October 1, 1898 — which village, under the provisions of the Greater New York charter (L. 1897, ch. 378), had become merged with the city on the 1st day of January, 1898 — it appeared from the complaint and the opening of plaintiff's counsel, *first*, that, pursuant to the Greater New York charter, a budget had been prepared by the proper authorities of the village, which included the contract in question, and that taxes had been accordingly levied; and, *second*, that the contract had been fully performed, with defendant's knowledge, it is reversible error to dismiss the complaint upon the ground that the trustees of the village had no right to make the contract, the performance of which extended beyond their fixed terms of office. The plaintiff should have been allowed to try his case and to prove, if he could, that the contract sued upon had been, in good faith, made and included in the budget for the year 1898; that the taxes required under the budget had been levied for 1898, and that the work called for by the contract had been fully performed. *Schuran v. City of New York.* 32

14. *Item — New York City Charter — When Assessments Objected to Must Be Reviewed by Board of Revision of Assessments.* Under section 950 of the charter of the city of New York (L. 1897, ch. 378) where an assessment is made by the board of assessors and objections thereto are interposed in writing, and the assessment is not altered so as to satisfy the objectors, the board has no power to declare the assessment confirmed, but under section 944 it is its duty to present such objections with the proposed assessment to the board of revision of assessments for its review. *People ex rel. Decker v. McCue.* 347

See, also, par. 22, this title.

15. 1897, Ch. 414 — *Village Law — Municipal Bonds — Resolution to Purchase Water Works System — Language Sufficient to Authorize Issue of Bonds for Such Purpose.* A resolution, duly adopted by the taxpayers of an incorporated village, that there "shall be raised upon the village" the necessary amount for the purchase of a water works system is broad enough, under section 128 of the Village Law (L. 1897, ch. 414), to authorize the issue of bonds on the credit of the municipality for that purpose. A taxpayer's action to restrain such issue of bonds cannot be maintained on the ground that the words of the resolution were insufficient to authorize it, nor on the ground that the words of the resolution, if sufficient to authorize such issue of bonds, are indefinite in that they also include the power to levy a tax, thus committing the choice of methods to the board of trustees, a power which the electors are not authorized to delegate to the board, and which it is not authorized to exercise. The statute does not authorize, or suggest even, the payment of the purchase price

SESSION LAWS—Continued.

of water works by taxation, but does, in terms, authorize the borrowing of money to pay for them; the language of the resolution is broad enough to cover it; therefore, the trustees did what the taxpayers, by permission of the statute, authorized. *N. Y. & Rosendale Cement Co. v. Davis*. 235

16. 1897, *Ch. 415—Labor Law—Negligence—Employment of Children under Fourteen Years of Age in Factory*. Section 70 of the Labor Law (L. 1897, ch. 415), prohibiting the employment of a child under the age of fourteen years in any factory in this state, in effect declares that a child under the age specified presumably does not possess the judgment, discretion, care and caution necessary for the engagement in such a dangerous avocation, and, therefore, is not as a matter of law chargeable with contributory negligence or with having assumed the risks of the employment. *Marino v. Lehmaier*. 530

17. *Idem—Civil Liability of Employer*. The fact that the statute provides that a violation of it shall constitute a misdemeanor, and, therefore, the proprietor of a factory is criminally liable for the employment of children under the prescribed age, does not relieve him from civil liability for injuries sustained by such an employee; and in an action therefor, such employment is in and of itself some evidence of negligence in cases where the accident could not have happened but for the employment. *Id.*

18. 1897, *Ch. 612—Negotiable Instruments Law—Bills, Notes and Checks—When Maker of Note Signed by him as "Trustee," Is Not Personally Liable—Question of Fact*. A trustee of an insolvent firm, for the benefit of creditors thereof, appointed by such firm and its creditors, is not personally liable under the provisions of the Negotiable Instruments Law (L. 1897, ch. 612, § 39), upon a note signed by him as "trustee," but without disclosing his representative character upon the face of the note, where the payee is one of such creditors and the consideration for which the note was given was property purchased from the payee for the benefit of the trust estate; but where in an action upon the note, brought by the payee, against the maker, the evidence is conflicting as to whether the property, for which the note was given, was purchased for the benefit of the trust estate and whether the plaintiff agreed to accept the note of defendant in his representative capacity, the direction of a verdict in favor of the defendant is reversible error. *Megowan v. Peterson*. 1

19. 1898, *Ch. 230—Construction of Act Relating to Public Administrator in the County of New York and Section 2476 of the Code of Civil Procedure*. Subdivision 2 of section 4 of chapter 230 of the Laws of 1898, relating to the public administrator in the county of New York and referring to assets which "shall arrive within the county of New York after his death," and section 2476 of the Code of Civil Procedure, defining the exclusive jurisdiction of Surrogates' Courts and referring to property "which has since his death come into the state and remains unadministered," must be construed as meaning that the assets must "arrive" or "come" into the state in good faith, in due course of business, and not for the avowed object of securing a resident plaintiff who can prosecute a negligence action against a foreign corporation on a cause of action arising in and between residents of another state. *Hoes v. N. Y., N. H. & H. R. R. Co.* 435

20. 1900, *Ch. 742—Constitutional Law—Judgment for Alimony Constitutes Property of Wife of which she Cannot Be Deprived without Due Process of Law*. A final judgment granting a divorce and directing the defendant to pay a certain sum per year for the plaintiff's support and the education and maintenance of her children creates and vests substantial rights which constitute property of the plaintiff, of which she cannot be deprived without due process of law (Const. art. I, § 6); and a subse-

SESSION LAWS — Continued.

quent statute (L. 1900, ch. 742), permitting the court upon the application of either party to an action, at any time after final judgment, whether heretofore or hereafter rendered, to annul, vary or modify a direction of such judgment requiring the defendant to provide for the education and maintenance of the children of the marriage and for the support of the plaintiff, is unconstitutional in so far as it attempts to confer a power upon the court to annul, or vary, valid and final judgments rendered before the enactment of the statute. *Livingston v. Livingston.* 377

21. 1901, Ch. 83 — *Not Violative of § 16, Art. 3, of State Constitution Relating to Local Bills.* Chapter 83 of the Laws of 1901, abolishing the board of police commissioners and the office of chief of police of the city of New York, and imposing the duties of those offices upon a single commissioner, is not in conflict with section 16 of article 3 of the Constitution, as embracing more than one subject which is not expressed in its title, since the act embraces but one subject, viz., the reorganization of the police force of the city, and that is not only sufficiently but is elaborately expressed in the title. *People ex rel. Devery v. Coler.* 108

22. *Idem* — *Not Violative of the Federal Constitution as Impairing the Obligation of Contracts.* The act is not violative of the Federal Constitution as impairing the obligation of a contract, in that it deprives the incumbent of the office of chief of police of his right to the pension to which he would have been entitled had he been permitted to serve as such officer for the requisite time, and which would have been paid out of a fund, a part of which was derived from deductions from his salary. (L. 1897, ch. 378, §§ 351-357.) 1. Because assuming, but not deciding, that the statutory provision for pensions constituted a contract with him, the legislature has the right to abolish the office, and as the act does not purport to abrogate his right to a pension, if he has any vested rights beyond the power of legislative interference, he may assert them in a proper proceeding. 2. Assuming, but not deciding, that the pension scheme was such that the legislature could not abolish the office without violating such contract, then the original legislation establishing the scheme was void, so far as it led to any such result, since one legislature cannot bind the hands or limit the powers of subsequent legislatures in matters that are strictly governmental, and what it cannot do directly it cannot do indirectly by authorizing the municipality to enter into any contract with an incumbent of the office which would have that effect. *Id.*

23. 1901, Ch. 466 — *New York City Charter — Provisions Requiring Engineers Operating Boilers within the City to Have License from Police Department Are Not Applicable to Engineers of Boilers Temporarily within the City.* Section 843 of the present charter of the city of New York (L. 1901, ch. 466), providing that it shall not be lawful for any person to operate or use steam boilers therein specified without having a certificate of qualification therefor issued by the police department of the city, must be read in connection with section 342, providing for the inspection of boilers within the city, and so read relates only to steam boilers permanently located and in use in the city of New York; and where a foreign corporation, engaged, under a contract with the United States government, in removing an island from the East river, had steam boilers for the prosecution of the work temporarily within the limits of the city, an engineer employed by such corporation is not liable to arrest and conviction under section 843 for operating such boilers without having a certificate of qualification issued by the police department of the city. *People v. Prillen.* 67

24. 1901, Ch. 507 — *State Printing Law — When Form of Guaranty Attached to Proposal for Contract for Legislative Printing Sufficiently Complies Therewith — Unimportant Variance in Bid — Legislative Construction.* A contract, made for legislative printing in strict accordance with the

SESSION LAWS—Continued.

State Printing Law (L. 1901, ch. 507), in which the only defect claimed is that the proposal of the lowest bidder, to whom the contract was awarded, did not have a guaranty indorsed thereon in the precise language of section 5, requiring "a satisfactory guaranty for the proper performance of the contract," although the guaranty was in the form required by the State Printing Board as prescribed by section 10, relating to department printing, but requiring precisely the same guaranty as section 5, and was to the effect that if the bidder's proposal was accepted it would enter into a contract in compliance with it and give the necessary security, is valid, the guaranty being a sufficient, although not a literal, compliance with the requirements of the statute; since such defect must be regarded as an unimportant variance in the proposal, especially where the legislature, having in section 10 set forth a form which it regarded as a sufficient compliance with the provisions of the required guaranty, must be regarded as having construed the meaning of the words used in section 5. *People ex rel. J. B. Lyon Co. v. McDonough.* 181

25. *Idem—Intent of Statute.* The purpose of the statute was not that the performance of the final contract should be guaranteed before it was made, but that the contract or agreement involved in the proposals should be performed by entering into the final contract and giving the necessary security, thus preventing "straw" bids. Nor is a double guaranty of the performance of the final agreement required; when the second guaranty is given it supersedes the first, and such is the intent and purpose of the statute. *Id.*

26. 1902, Ch. 486—*Crimes—Use of Carbonic Acid Gas in the Manufacture of Soda Water in a Tenement House Not a Misdemeanor.* The fact that one who manufactured soda water in the basement of a tenement-house used carbonic acid gas in the process, and that such gas is a "compressed gas," will not support his conviction for a misdemeanor in violating section 389 of the Penal Code as it stood before the amendment of 1902 (L. 1902, ch. 486) prohibiting, among other things, the manufacture of compressed gases or of any explosive articles or compounds, where there is no evidence that the carbonic acid gas used was manufactured on the premises and none to show that soda water is an explosive or its manufacture dangerous. *People v. Lichtman.* 63

SODA WATER.

Use of carbonic acid gas in the manufacture of, in a tenement house not a misdemeanor.

See CRIMES, 1.

SOUTHAMPTON (TOWN OF).

Roadway and bridge across Great South bay.

See CONTRACT, 3, 4.

SPECIFIC PERFORMANCE.

When complaint in action for, improperly dismissed.

See TRIAL, 1.

STATUTE OF LIMITATIONS.

Question of fact.

See APPEAL, 7.

STATUTES.

State Printing Law—legislative construction—intent of statute.

See CONTRACT, 7, 8.

Imposing duties upon public officers—when not required to be literally performed in unessential particulars.

See OFFICERS.

STEAM BOILERS.

Engineers operating, in New York city — when license from police department not necessary.

See NEW YORK (CITY OF), 3.

STOCKS.

Agreement for procurement of legislative action for the purpose of depreciating price of corporate securities void as against public policy.

See CONTRACT, 14.

Franchise tax computed on actual, not par value of.

See TAX, 1.

STREET RAILWAYS.

When company not liable for death of person kicked or thrown from car by motorman and struck by another car while crossing the tracks.

See NEGLIGENCE, 4.

Injury resulting from overcrowded platform of horse car — when negligence of railroad company a question of fact.

See NEGLIGENCE, 7-9.

STREETS.

Slight defect in crosswalk — exemption of municipality from liability.

See NEGLIGENCE, 1.

When railroad company not liable for consequential damages resulting from erection of steel viaduct upon which its trains are run in and through city street.

See RAILROADS.

SUBROGATION.

Wrongdoers not entitled to enforce.

See CORPORATIONS, 2.

SUMMING UP.

Improper — when question cannot be considered on appeal.

See APPEAL, 5.

Of counsel, when improper.

See TRIAL, 2.

Improper statement of counsel.

See TRIAL, 3.

SUPERVISORS.

Enforcement of judgment requiring board of, to levy tax and pay over proceeds to county treasurer to be invested for a town.

See MANDAMUS.

SUPREME COURT.

Duties imposed upon, by statute relating to construction of highways, judicial not administrative.

See CONSTITUTIONAL LAW, 3.

SURROGATE'S COURT.

Decree may be collaterally attacked for fraud and collusion — bringing assets of deceased non-resident into the state in order to procure letters of administration.

See EXECUTORS AND ADMINISTRATORS, 1, 2.

TAX.

1. *Franchise — Computed on Actual, not Par Value of Stock.* Under sections 182 and 190 of the Tax Law (L. 1896, ch. 908) the actual, not the par, value of the capital stock of a corporation employed within this state is the basis for computing the franchise tax. *People ex rel. N. Y. C. & H. R. R. Co. v. Knight.* 255

2. *Taxable Capital — Rolling Stock of Railroad Corporations.* The value of the rolling stock of a domestic railroad corporation, except that used exclusively outside of the state, is capital employed within this state. *Id.*

3. *Non-taxable Capital — Pledged Stock of Foreign Corporations.* Stock of foreign corporations purchased by a domestic railroad corporation by the issue of bonds, the stock being pledged to a trust company in this state as collateral security for their payment, constitutes no part of its capital employed therein. *Id.*

4. *Anticipated Dividends — Bills Receivable — Coal and Supplies.* The amount of "anticipated dividends on stock of other corporations owned by a domestic railroad corporation, the amount of bills receivable for expenditures on leased lines, and the value of coal and supplies owned by the corporation without the state," constitute no part of its capital employed therein. *Id.*

5. *Stock of Domestic Transportation Company.* The stock of a domestic transportation company employing the capital represented thereby outside the state, owned by a domestic railroad corporation, constitutes no part of the latter's capital employed therein. *Id.*

When assessments objected to in New York city must be reviewed by board of revision of assessments.

See NEW YORK (CITY OF), 4.

TAXPAYER'S ACTION.

When cannot be maintained to restrain issue of village bonds.

See VILLAGES.

TENEMENT HOUSES.

Use of carbonic acid gas in the manufacture of soda water in, not a misdemeanor.

See CRIMES, 1.

TITLE.

One claiming title adverse and in hostility to plaintiff and his cotenants in an action for partition may be made a party.

See PARTITION, 1.

TOWNS.

Drafted men not liable for moneys received from, under the void Drafted Men's Act.

See BONDS, 1.

Highway bonds — validity of.

See BONDS, 2, 3.

Enforcement of judgment requiring board of supervisors to levy tax and pay over proceeds to county treasurer to be invested for a town.

See MANDAMUS.

TRESPASS.

When cannot be maintained against person using road on land of residence park association.

See ASSOCIATIONS, 1.

TRIAL.

1. *Dismissal of Complaint on Pleadings—Erroneous When Issues Raised.* A complaint in an action for the specific performance of a contract is improperly dismissed upon the pleadings where the plaintiff insists that it has fully performed the contract, while the defendant admits it has attempted to rescind it on the ground of plaintiff's non-performance, and has proceeded in a general way as if the contract no longer existed, thus raising distinct issues for trial. *St. Regis Paper Co. v. Santa Clara Lumber Co.* 149

2. *Improper Summing Up of Counsel.* Upon the trial of an action, if the summing up passes beyond the bounds of legal propriety, it is the duty of counsel to object specifically and point out the language deemed objectionable, requesting the court to rule on the objection and except to the ruling if adverse; the refusal of the court to admonish counsel to desist and direct the jury at the proper time to disregard improper statements of counsel is also a proper ground for exceptions. *Dimon v. N. Y. C. & H. R. R. Co.* 356

3. *Improper Statement of Counsel in Summing Up—Not the Subject of Review Unless Proper Exception Is Taken.* An improper statement of counsel in summing up should be promptly called to the attention of the court, its objectionable features pointed out, a request made for a direction to counsel to desist and to the jury to disregard, and, in case of refusal, an exception noted in order that the alleged error may be raised and reviewed upon appeal; calling attention to the subject for the first time after the charge and then taking an exception to the language used by counsel in summing up, presents no question reviewable by the Court of Appeals. *Cattano v. Met. St. Ry. Co.* 565

4. *Motion to Withdraw a Juror.* A motion to withdraw a juror on account of the improper summing up of counsel rests in the discretion of the trial court, and an exception to its denial presents no error reviewable by the Court of Appeals. *Id.*

Charge must be considered in its entirety.

See APPEAL, 2.

Refusal to charge—repetition.

See APPEAL, 3.

Improper summing up of counsel.

See APPEAL, 5.

When dismissal of complaint constitutes a nonsuit.

See APPEAL, 6.

Question for jury.

See BANKING, 3.

Erroneous direction of verdict.

See CONTRACT, 1.

For murder—question for jury—witnesses' credibility—jury may believe part, and reject part, of testimony.

See CRIMES, 2-4.

For murder—sufficiency of evidence—charge to jury.

See CRIMES, 11, 14.

When record of board of health inadmissible to show cause of death.

See EVIDENCE, 3.

TRIAL — *Continued.*

Action for separation — counterclaim that plaintiff had husband living — when voidable marriage not a ground for dismissal of complaint.

See HUSBAND AND WIFE, 1-3.

Action for negligence — erroneous submission to jury.

See MASTER AND SERVANT, 3.

TRUSTS.

Grantees under trust deed not liable as heirs at law for debts of decedent.

See DECEDENT'S ESTATE, 2.

Action by residuary legatee against trustees — may be commenced before death of life tenant.

See JUDGMENT, 1, 2.

When executor and trustee under a power given by will may delegate execution of such power.

See WILL, 2.

Suspension of power of alienation — when trust invalid because term thereof cannot be measured by two lives in being at death of testator.

See WILL, 3.

TRUSTEES.

When maker of note signed by him as "trustee" is not personally liable.

See BILLS, NOTES AND CHECKS.

UNITED STATES REVISED STATUTES.

§ 5242 — *Attachment against Solvent National Bank Prohibited.* Section 5242 of the United States Revised Statutes, prohibiting the issuing of an attachment before judgment against national banking associations by any state, county or municipal court, applies to a solvent national bank. *Van Reed v. People's Nat. Bank.* 314

UNITED STATES STATUTES AT LARGE.

Acts Prohibiting Attachment Not Repealed by Act of Congress of 1882. The act of Congress of July 12, 1882 (22 U. S. Stat. at Large, 162), did not repeal the earlier acts of Congress prohibiting attachments against national banking associations — that act was intended to prescribe the forum for litigation by and against national banks and does not relate to provisional remedies to be had in such actions. It was designed to prescribe the place where and the courts in which such actions may be prosecuted, but it was not intended to regulate the procedure in such actions when brought, nor was it intended to so regulate the method of commencing an action as to enable a state court to acquire jurisdiction over the property of a national bank without acquiring jurisdiction of the bank itself. *Van Reed v. People's Nat. Bank.* 314

VERDICT.

Erroneously directed.

See CONTRACT, 1.

VETERANS.

Veteran volunteer fireman discharged from municipal position for "lack of work" not entitled to reinstatement or to position held by another employee.

See NEW YORK (CITY OF), 5.

VILLAGES.

Municipal Bonds — Resolution to Purchase Water Works System — Language Sufficient to Authorize Issue of Bonds for Such Purpose — Village Law, § 128 (L. 1897, ch. 414). A resolution, duly adopted by the taxpayers of an incorporated village, that there "shall be raised upon the village" the necessary amount for the purchase of a water works system is broad enough, under section 128 of the Village Law (L. 1897, ch. 414), to authorize the issue of bonds on the credit of the municipality for that purpose. A taxpayer's action to restrain such issue of bonds cannot be maintained on the ground that the words of the resolution were insufficient to authorize it, nor on the ground that the words of the resolution, if sufficient to authorize such issue of bonds, are indefinite in that they also include the power to levy a tax, thus committing the choice of methods to the board of trustees, a power which the electors are not authorized to delegate to the board, and which it is not authorized to exercise. The statute does not authorize, or suggest even, the payment of the purchase price of water works by taxation, but does, in terms, authorize the borrowing of money to pay for them; the language of the resolution is broad enough to cover it; therefore, the trustees did what the taxpayers, by permission of the statute, authorized. *N. Y. & Rosendale Cement Co. v. Davis.* 285

VITAL STATISTICS.

When record of, inadmissible to show cause of death.

See EVIDENCE, 3.

WAIVER.

Assumption of obvious risk.

See MASTER AND SERVANT, 2.

WASTE.

Of funds of corporation — liability of directors.

See CORPORATIONS, 1-4.

WIDOW.

When title to portion of property of decedent vests absolutely in.

See DECEDENT'S ESTATE, 1.

WILL.

1. *Discretionary Power of Sale of Real Estate — Code Civ. Pro. § 2759.* A testamentary power of sale, "I authorize and empower such executors who act to sell and convey any real estate of which I die seized," with no mention in the will of testator's debts, is discretionary, not imperative, and does not deprive a creditor of the right to a judicial sale of the real estate under section 2759 of the Code of Civil Procedure relating to the sale of a decedent's real property for the payment of debts. *Parker v. Beer.* 332

2. *When Executor and Trustee, under a Power Given by Will, May Delegate Execution of Such Power.* While an executor and trustee, under a power given him by a will, may not delegate the personal trust and confidence imposed upon him by the will and must exercise the judgment and discretion with which he has been invested in the execution of the power, yet having, with full knowledge of the facts, determined to sell real estate held by him as trustee, for a certain price, he may authorize his attorney to close the sale, and any contract entered into by the latter for the sale of the property at the price fixed is valid and binding upon such executor and trustee. *Gates v. Dudgeon.* 426

3. *Suspension of the Power of Alienation — When Trust Invalid because Term Thereof Cannot Be Measured by Two Lives in Being at Death of Testator.* A testator, whose only next of kin and heir at law was a mar-

TRIAL — *Continued.*

Action for separation — counterclaim that plaintiff had husband living — when voidable marriage not a ground for dismissal of complaint.

See HUSBAND AND WIFE, 1-3.

Action for negligence — erroneous submission to jury.

See MASTER AND SERVANT, 3.

TRUSTS.

Grantees under trust deed not liable as heirs at law for debts of decedent.

See DECEDENT'S ESTATE, 2.

Action by residuary legatee against trustees — may be commenced before death of life tenant.

See JUDGMENT, 1, 2.

When executor and trustee under a power given by will may delegate execution of such power.

See WILL, 2.

Suspension of power of alienation — when trust invalid because term thereof cannot be measured by two lives in being at death of testator.

See WILL, 3.

TRUSTEES.

When maker of note signed by him as "trustee" is not personally liable.

See BILLS, NOTES AND CHECKS.

UNITED STATES REVISED STATUTES.

§ 5242 — *Attachment against Solvent National Bank Prohibited.* Section 5242 of the United States Revised Statutes, prohibiting the issuing of an attachment before judgment against national banking associations by any state, county or municipal court, applies to a solvent national bank. *Van Reed v. People's Nat. Bank.* 314

UNITED STATES STATUTES AT LARGE.

Acts Prohibiting Attachment Not Repealed by Act of Congress of 1882. The act of Congress of July 12, 1882 (22 U. S. Stat. at Large, 162), did not repeal the earlier acts of Congress prohibiting attachments against national banking associations — that act was intended to prescribe the forum for litigation by and against national banks and does not relate to provisional remedies to be had in such actions. It was designed to prescribe the place where and the courts in which such actions may be prosecuted, but it was not intended to regulate the procedure in such actions when brought, nor was it intended to so regulate the method of commencing an action as to enable a state court to acquire jurisdiction over the property of a national bank without acquiring jurisdiction of the bank itself. *Van Reed v. People's Nat. Bank.* 314

VERDICT.

Erroneously directed.

See CONTRACT, 1.

VETERANS.

Veteran volunteer fireman discharged from municipal position for "lack of work" not entitled to reinstatement or to position held by another employee.

See NEW YORK (CITY OF), 5.

VILLAGES.

Municipal Bonds—Resolution to Purchase Water Works System—Language Sufficient to Authorize Issue of Bonds for Such Purpose—Village Law, § 128 (L. 1897, ch. 414). A resolution, duly adopted by the taxpayers of an incorporated village, that there "shall be raised upon the village" the necessary amount for the purchase of a water works system is broad enough, under section 128 of the Village Law (L. 1897, ch. 414), to authorize the issue of bonds on the credit of the municipality for that purpose. A taxpayer's action to restrain such issue of bonds cannot be maintained on the ground that the words of the resolution were insufficient to authorize it, nor on the ground that the words of the resolution, if sufficient to authorize such issue of bonds, are indefinite in that they also include the power to levy a tax, thus committing the choice of methods to the board of trustees, a power which the electors are not authorized to delegate to the board, and which it is not authorized to exercise. The statute does not authorize, or suggest even, the payment of the purchase price of water works by taxation, but does, in terms, authorize the borrowing of money to pay for them; the language of the resolution is broad enough to cover it; therefore, the trustees did what the taxpayers, by permission of the statute, authorized. *N. Y. & Rosendale Cement Co. v. Davis.* 235

VITAL STATISTICS.

When record of, inadmissible to show cause of death.

See EVIDENCE, 3.

WAIVER.

Assumption of obvious risk.

See MASTER AND SERVANT, 2.

WASTE.

Of funds of corporation—liability of directors.

See CORPORATIONS, 1-4.

WIDOW.

When title to portion of property of decedent vests absolutely in.

See DECEDENT'S ESTATE, 1.

WILL.

1. *Discretionary Power of Sale of Real Estate—Code Civ. Pro. § 2759.* A testamentary power of sale, "I authorize and empower such executors who act to sell and convey any real estate of which I die seized," with no mention in the will of testator's debts, is discretionary, not imperative, and does not deprive a creditor of the right to a judicial sale of the real estate under section 2759 of the Code of Civil Procedure relating to the sale of a decedent's real property for the payment of debts. *Parker v. Beer.* 332

2. *When Executor and Trustee, under a Power Given by Will, May Delegate Execution of Such Power.* While an executor and trustee, under a power given him by a will, may not delegate the personal trust and confidence imposed upon him by the will and must exercise the judgment and discretion with which he has been invested in the execution of the power, yet having, with full knowledge of the facts, determined to sell real estate held by him as trustee, for a certain price, he may authorize his attorney to close the sale, and any contract entered into by the latter for the sale of the property at the price fixed is valid and binding upon such executor and trustee. *Gates v. Dudgeon.* 426

3. *Suspension of the Power of Alienation—When Trust Invalid because Term Thereof Cannot Be Measured by Two Lives in Being at Death of Testator.* A testator, whose only next of kin and heir at law was a mar-

WILL — Continued.

ried daughter whose only living issue was an infant daughter born about two months after testator's death, left a will giving all of his property to his executors in trust, directing them to sell his real estate and hold the proceeds thereof, together with his invested personal property, in trust, for the following purposes:

"1. (VI) To pay the income thereof to the daughter during her life;

"2. (VII) After her death, leaving issue, to pay over said income to such issue in equal shares until the youngest of such issue shall have attained the age of twenty-one years and then to divide and distribute the whole trust fund so held among such issue in equal shares, each share and share alike;

"3. (VIII) In case the daughter dies without leaving issue, to pay over the whole trust fund to the children of his brother-in-law and sister, share and share alike;

"4. (IX) In case the daughter dies leaving issue, but none should reach the age of twenty-one years, to divide and distribute the whole trust fund among the children of his said brother-in-law and sister."

Held, that the trust provisions must be construed by the rules applicable to personal property, and since it is obvious from the 7th and 8th clauses that the trust fund was not only to remain undivided until the youngest of the issue left by testator's daughter should attain the age of twenty-one years, and that if none of such issue should reach that age, the fund should be divided among the beneficiaries named in the 8th clause, and that it is impossible to determine, until the happening of one or the other of such contingencies, between whom the division was to be made or in whom the testator intended the title to vest, the absolute ownership of the trust fund could not vest during the minority of the youngest child that should be born to testator's daughter during wedlock; consequently, the term during which such ownership was to be suspended was not to be measured by two lives in being at the death of the testator, but by the life of his daughter, and then by the majority of the youngest child that should have been born to her and be living at the time of her death, and might be suspended during the life and minority of a person not in being at the death of the testator; the attempted trust, therefore, is in contravention of the statute and void except in so far as it creates a trust for the life of testator's daughter. *Schlereth v. Schlereth.* 444

Construction of — when it does not suspend power of alienation for more than two lives in being.

See DECEDENT'S ESTATE, 3.

WITNESSES.

Credibility — jury may believe part, and reject part, of testimony.

See CRIMES, 4.

TABULAR LIST OF OPINIONS.

PARKER, Ch. J.

NEGLIGENCE.

Fellow-servant. (Dis. op.)

Simone v. Kirk, 7, 17.

EQUITY.

Superiority of lien of legacy charged upon real estate to that of mortgage given by residuary devisee; Neglect of legatee to enforce payment of legacy.

Conklin v. Weatherwax, 48, 47.

MUNICIPAL BONDS.

L. 1892, ch. 493, providing for the construction of highways and bridges upon highways running through two or more towns of the same county and the issuing of bonds to pay therefor; Unconstitutional because it attempts to confer upon the judiciary functions not judicial but administrative. (Dis. op.)

Citizens' Sav. Bank v. Town of Greenburgh, 215, 231.

Villages; Resolution to purchase water works system; Language sufficient to authorize issue of bonds for such purpose; Village Law, § 128 (L. 1897, ch. 414).

N. Y. & Rosendale Cement Co. v. Davis, 235, 237.

ACTION FOR A SEPARATION.

Counterclaim that plaintiff had husband living; When voidable marriage not a ground for dismissal of the complaint.

Taylor v. Taylor, 266, 267.

CONTRACT.

Tripartite agreement for the sale of saloon; Change in ownership or conduct of business affects the rights of the vendor. (Dis. op.)

Maloney v. Iroquois Brewing Co., 303, 312.

NEGLIGENCE.

Employment of children under fourteen years of age in factory; Effect of Labor Law (L. 1897, ch. 415, § 70); Civil liability of employer. (Con. op.)

Marino v. Lehmaier, 530, 537.

RAILROADS.

New York and Harlem Railroad Company not liable for consequential damages resulting from erection of steel viaduct, upon which its trains are run in and through Fourth avenue, in New York city; L. 1892, ch. 339.

Muhlker v. N. Y. & Harlem R. R. Co., 549, 551.

NEGLIGENCE.

Injury resulting from overcrowded platform of a street car;
Whether platform was overcrowded question of fact for
jury; The legal effect of overcrowding a question for the
court; Contributory negligence of injured person. (Dis.
op.)

Cattano v. Metropolitan Street Ry. Co., 565, 578.

REVIEW OF ASSESSMENT.

Unanimous affirmance; Finding of fact.
People ex rel. Sands v. Feitner, 647, 648.

GRAY, J.

NEGLIGENCE.

Fellow-servant. (Dis. op.)
Simone v. Kirk, 7, 17.

NEW YORK (CITY OF).

Contract made by trustees of village merged in city by chapter
378 of Laws of 1897; When recovery may be had there-
under against the city.

Schwan v. City of New York, 82, 84.

DEED.

Condition subsequent; Breach of condition; When acquies-
cence does not operate as an estoppel; Demand of per-
formance unnecessary; Damages.

Trustees of Union College v. City of New York, 88, 40.

MUNICIPAL BONDS.

Validity of, in the hands of bona fide holders, affected only by
fundamental defect in creation; Town highway bonds;
Sale of, at their face value, exclusive of interest, in vio-
lation of statute, does not affect their validity in the
hands of innocent purchasers; Constitutional law; L.
1892, ch. 493; Duties imposed upon Supreme Court
judicial, not administrative.

Citizens' Sav. Bank v. Town of Greenburgh, 215, 219.

BANKING.

Negligent certification of draft; Money paid by mistake;
Charge must be considered in its entirety; Certification
of draft; Estoppel; Payment of draft; Question for
jury; Refusal to charge; Repetition.

Continental Nat. Bank v. Tradesmen's Bank, 272, 277.

WILL.

Discretionary power of sale of real estate; Code Civ. Pro.
§ 2759.

Parker v. Beer, 332, 334.

PLEADING.

Action against personal representative of deceased joint debtor; Insolvency of the survivors or their inability to pay must be alleged; Code Civ. Pro. § 758.

Potts v. Dounce, 835, 836.

CONSTITUTIONAL LAW.

Judgment for alimony constitutes property of wife, of which she cannot be deprived without due process of law; L. 1900, ch. 742, in so far as it affects prior judgments for alimony, unconstitutional.

Livingston v. Livingston, 877, 879.

NEGLIGENCE.

When street railway company not liable for death of person kicked or thrown from car by motorman and struck by another car while crossing the tracks.

Pinder v. Brooklyn Heights R. R. Co., 519, 521.

CIVIL SERVICE.

New York city; Veteran volunteer fireman discharged from municipal position for "lack of work" not entitled to reinstatement or to position held by another employee.

People ex rel. Chappel v. Lindenthal, 524, 526.

NEGLIGENCE.

Employment of children under fourteen years of age in factory; Effect of Labor Law (L. 1897, ch. 415, § 70); Civil liability of employer. (Dis. op.)

Marino v. Lehmaier, 530, 547.

O'BRIEN, J.

CONTRACT.

Work done thereunder to be paid for "after certificate of approval should have been issued by the New York board of fire underwriters;" Recovery may be had when issuance of certificate prevented by default of owner.

N. Y. & N. H. A. Sprinkler Co. v. Andrews, 25, 28.

INSURANCE (LIFE).

When owner of stolen policy may maintain action for new paid-up policy.

Wilcox v. Equitable Life Assur. Society, 50, 52.

MISTAKE OF LAW.

Drafted men not liable for moneys received under the void Drafted Men's Act (L. 1892, ch. 664).

Newburgh Savings Bank v. Town of Woodbury, 55, 57.

NEGLIGENCE.

Injury to one stealing ride upon railroad train.

Johnson v. N. Y. C. & H. R. R. R. Co., 79, 80.

PARTITION.

One claiming title adverse and in hostility to plaintiff and his cotenants may be made a party.

Batterlee v. Kobbe, 91, 93.

CRIMES.

Murder; Question for jury; Witnesses; Credibility; Premeditation; Deliberation; Burglary; Attempt to commit; Overt act. (Dis. op.)

People v. Sullivan, 122, 137.

DECEDENT'S ESTATE.

When title to a portion of property vests absolutely in widow; Code Civil Procedure, § 2713; No obligation to reduce it to possession through administration in Surrogate's Court.

Crawford v. Nassoy, 163, 164.

REAL PROPERTY.

Construction of conveyance by warehouse company of lots bounded by a wharf fronting on basin, reserving ownership and control thereof; General rule as to lots exhibited on map and bounded by street not applicable; Rights of grantee; Appeal; Dismissal of, when question of fact might be involved in decision upon the merits.

India W. Brewing Co. v. Bklyn. W. & W. Co., 167, 170.

FRANCHISE TAX.

Computed on actual, not par value of stock; Taxable capital; Rolling stock of railroad corporations; Non-taxable capital; Pledged stock of foreign corporations: Anticipated dividends; Bills receivable; Coal and supplies; Stock of domestic transportation company. (Con. op.)

People ex rel. N. Y. C. & H. R. R. R. Co. v. Knight, 255, 259.

MANDAMUS.

Enforcement of judgment requiring board of supervisors to levy tax and pay over proceeds to county treasurer to be invested for a town.

People ex rel. Town of Walton v. Bd. Suprs., 297, 299.

CONTRACT.

Tripartite agreement for the sale of saloon; When "receive" should be construed as "collect;" Nominal change in ownership or conduct of business does not affect the rights of the vendor.

Maloney v. Iroquois Brewing Co., 303, 306.

CONSTITUTIONAL LAW.

Judgment for alimony; Not property within meaning of Constitution; L. 1900, ch. 742, providing that judgments for alimony may be annulled, varied or modified, constitutional. (Dis. op.)

Livingston v. Livingston, 377, 384.

NEGLIGENCE.

Employment of children under fourteen years of age in factory; Effect of Labor Law (L. 1897, ch. 415, § 70); Civil liability of employer. (Dis. op.)

Marino v. Lehmaier, 530, 540.

BARTLETT, J.

JURISDICTION.

Portion of East river within jurisdiction of city of New York; New York (city of); Provisions of charter (L. 1901, ch. 466, § 343) requiring engineers operating boilers within the city to have license from police department are not applicable to engineers of boilers temporarily within the city.

People v. Prillen, 67, 68.

PARTITION.

One claiming title adverse and in hostility to plaintiff and his cotenants may not be made a party. (Dis. op.)

Satterlee v. Kobbe, 91, 102.

CONSTITUTIONAL LAW.

Reorganization of the police department in the city of New York; L. 1901, ch. 33, not violative of § 16, art. 3 of State Constitution relating to local bills; Not violative of the Federal Constitution as impairing the obligation of contracts. (Con. op.)

People ex rel. Devery v. Coler, 103, 122.

CONTRACT.

Construction; Equitable relief; Remedy at law; When inadequate; Dismissal of complaint on pleadings; Erroneous when issues raised.

St. Regis Paper Co. v. S. C. Lumber Co., 149, 156.

REAL PROPERTY.

Construction of conveyance by warehouse company of lots bounded by a wharf fronting on basin, reserving ownership and control thereof; Rights of grantee. (Dis. op.)

India W. Brewing Co. v. Bklyn. W. & W. Co., 167, 179.

TRIAL.

Improper summing up of counsel; Appeal; Question not raised below.

Dimon v. N. Y. C. & H. R. R. R. Co., 356, 357.

MUTUAL BENEVOLENT SOCIETY.

Action by administratrix as quasi trustee for beneficiaries of death benefit; Payment to its own trustee does not release society from liability; When issuance of certificate showing member entitled to benefit is not a condition precedent to recovery; Admissions of liability.

Pfeiffer v. Supreme Lodge Bohemian S. B. Soc., 418, 420.

SURROGATE'S COURT.

Surrogate's decree may be collaterally attacked for fraud and collusion; Bringing assets of deceased non-residents into the state in order to procure letters of administration; Action by administrator cannot be entertained by the courts; Construction of act relating to public administrator in the county of New York and section 2476 of the Code of Civil Procedure.

Hoes v. N. Y., N. H. & H. R. R. Co., 435, 437.

MASTER AND SERVANT.

Assumption of obvious risk; Negligence.

Drake v. Auburn City Ry. Co., 466, 469.

JUDGMENT.

Judgment in an action is bar to another action for same cause brought by a co-defendant therein against some of the defendants in the first action. (Dis. op.)

Earle v. Earle, 480, 490.

RAILROADS.

New York and Harlem Railroad Company liable for consequential damages resulting from erection of steel viaduct upon which its trains are run in and through Fourth avenue in New York city; L. 1892, ch. 339. (Dis. op.)

Muhlker v. N. Y. & Harlem R. R. Co., 549, 557.

TRIAL.

Improper summing up of counsel; Objection thereto cannot be considered by Court of Appeals where no ruling was made by trial court and no exception taken.

Dimon v. N. Y. C. & H. R. R. Co., 635.

HAIGHT, J.

BILLS, NOTES AND CHECKS.

When maker of note, signed by him as "trustee" is not personally liable; Negotiable Instruments Law (L. 1897, ch. 612, § 39); Question of fact.

Megowan v. Peterson, 1, 3.

CRIMES.

Use of carbonic acid gas in the manufacture of soda water in a tenement house not a misdemeanor under section 389, Penal Code.

People v. Lichtman, 63, 64.

MUNICIPAL CORPORATION.

Slight defect in crosswalk; Exemption from liability.

Hamilton v. City of Buffalo, 72, 73.

CONSTITUTIONAL LAW.

Reorganization of the police department in the city of New York; L. 1901, ch. 33, not violative of § 16, art. 3 of State Constitution relating to local bills; Not violative of the Federal Constitution as impairing the obligation of contracts. (Con. op.)

People ex rel. Devery v. Coler, 103, 122.

HIGHWAYS.

Order appointing commissioners under section 84, Highway Law.

Matter of Baker, 249, 250.

FRANCHISE TAX.

Taxable capital; Rolling stock of railroad corporations.

People ex rel. N. Y. C. & H. R. R. Co. v. Knight, 255, 257.

APPEAL.

Question of fact; Presumption of death; Code Civ. Pro. § 841; Facts authorizing presumption of death must be proved to establish the fact of death.

Matter of Bd. of Education of New York, 321, 322.

CONTRIBUTORY NEGLIGENCE.

Riddle v. Forty-second St., etc., R. Co., 327, 329.

EVIDENCE.

Life insurance; Record of board of health inadmissible to show cause of death.

Beglin v. Metropolitan Life Ins. Co., 374, 375.

WILL.

When executor and trustee, under a power given by will, may delegate execution of such power; What constitutes a contract of sale by letter.

Gates v. Dudgeon, 426, 428.

CORPORATIONS.

Liability of directors for waste of funds; Joint tort feorsors; Equity; Wrongdoers not entitled to compel contribution or to enforce subrogation; Instrument in effect a covenant not to sue does not release joint tort feorsors; Directors not relieved from liability by release granted by themselves to a co-director.

Gilbert v. Finch, 455, 458.

HUSBAND AND WIFE.

Evidence; Decree of divorce obtained by wife in another state, upon grounds not recognized in this state, competent evidence against her in action for dower in husband's property acquired subsequent to divorce.

Starbuck v. Starbuck, 503, 505.

NEGLIGENCE.

Employment of children under fourteen years of age in factory; Effect of Labor Law (L. 1897, ch. 415, § 70); Civil liability of employer.

Marino v. Lehmaier, 530, 532.

MARTIN, J.

CONSTITUTIONAL LAW.

Reorganization of the police department of the city of New York; L. 1901, ch. 33, not violative of § 16, art. 3 of State Constitution relating to local bills; Not violative of the Federal Constitution as impairing the obligation of contracts. (Con. op.)

People ex rel. Devery v. Coler, 103, 122.

PUBLIC OFFICERS.

When statutes imposing duties upon, are not required to be literally performed in unessential particulars; State Printing Law; When form of guaranty attached to proposal for contract for legislative printing sufficiently complies therewith; Unessential variance in bid; Legislative construction.

People ex rel. J. B. Lyon Co. v. McDonough, 181, 184.

NEW YORK (CITY OF).

When assessments objected to must be reviewed by board of revision of assessments.

People ex rel. Decker v. McCue, 347, 348.

WILL.

Suspension of the power of alienation; When trust invalid because term thereof cannot be measured by two lives in being at death of testator.

Schlereth v. Schlereth, 444, 447.

VANN, J.

NEGLIGENCE.

Liability of master when safe place to work in becomes unsafe; When foreman is not a fellow-servant.

Simone v. Kirk, 7, 10.

MUNICIPAL CORPORATION.

Defect in sidewalk. (Dis. op.)

Hamilton v. City of Buffalo, 72, 76.

EVIDENCE.

Parol evidence inadmissible to vary writing ; Town of Southampton ; Injunction.

Trustees of Southampton v. Jessup, 84, 86.

DEVISES.

Compromise agreement ; Credit of payments ; Heirs ; Agreement ; Construction ; Interest.

Chauvet v. Ives, 192, 194.

INSURANCE (FIRE).

Apportionment of loss ; Definition of term "whole insurance ;" Percentage co-insurance ; Face value of all policies on same property constitutes the whole insurance ; Method of apportionment.

Farmers' Feed Co. v. Scottish Union Ins. Co., 241, 243.

ATTACHMENT.

Against solvent national bank prohibited ; U. S. R. S. § 5242 ; Acts prohibiting attachment not repealed by act of Congress of 1882 ; Construction of act of 1882.

Van Reed v. People's Nat. Bank, 314, 316.

ATTORNEY AND CLIENT.

Code Civ. Pro. § 66 ; Attorney's lien ; Enforcement after settlement by the parties before trial by equitable action ; Code remedy not exclusive ; What must and may be shown in such action.

Fischer-Hausen v. Bklyn. Heights R. R. Co., 492, 495.

MURDER.

When finding of jury that defendant "took with him a dangerous weapon" not warranted by the evidence. (Dis. op.)

People v. Filippelli, 509, 519.

NEGLIGENCE.

Injury resulting from overcrowded platform of horse car ; When negligence of company a question of fact ; Contributory negligence ; Trial ; Improper statement of counsel in summing up ; Not the subject of review unless proper exception is taken ; Motion to withdraw a juror.

Cattano v. Metropolitan Street Ry. Co., 585, 587.

RAILROADS.

New York and Harlem Railroad Company held not liable for consequential damages resulting from erection of steel viaduct, upon which its trains are run in and through Fourth avenue, in New York city, on authority of *Fries v. N. Y. & Harlem R. R. Co.* (169 N. Y. 270), and *Muhler v. N. Y. & Harlem R. R. Co.* (173 N. Y. 549). (Con. op.)
Keirns v. N. Y. & Harlem R. R. Co., 642.

CULLEN, J.

MARINE INSURANCE.

Constructive total loss; When abandonment not necessary to constitute a constructive loss.

Devitt v. Providence Washington Ins. Co., 17, 20.

NEW YORK (CITY OF).

Contract made by trustees of village merged in city by chapter 378, Laws of 1897; When recovery may not be had thereunder against the city. (Dis. op.)

Schwan v. City of New York, 32, 36.

CONSTITUTIONAL LAW.

Reorganization of the police department in the city of New York; L. 1901, ch. 33, not violative of § 16, art. 3 of State Constitution, relating to local bills; Not violative of the Federal Constitution as impairing the obligation of contracts.

People ex rel. Devery v. Coler, 103, 106.

CRIMES.

Murder; Question for jury; Witnesses; Credibility; Jury may believe part, and reject part of testimony; Premeditation; Deliberation; Burglary; Attempt to commit; Overt act.

People v. Sullivan, 122, 126.

HIGHWAYS.

What constitutes dedication of lands of residence park association; Trespass; Residence park association; Statute authorizing association to establish rules regulating trade upon grounds thereof does not authorize a monopoly; Reservation of power to regulate contemplates reasonable regulation; When sales to lessees by unlicensed dealer cannot be restrained.

Thousand Island Park Assn. v. Tucker, 203, 206.

ASSIGNMENT FOR CREDITORS. (L. 1877, ch. 466.)

When assignee's sale may be set aside upon summary application.

Matter of Sheldon, 287, 288.

INSURANCE (LIFE).

When the proceeds of an assignable policy become a part of the insured's estate.

Leonard v. Harney, 352, 353.

DECEDENT'S ESTATE.

Action to charge heirs at law and devisees with debts of their decedents; Grantees under trust deed not liable as heirs at law; Construction of will; When it does not suspend

CRIMES — *Continued.*

sidered; Indictment presumed to have been based upon legal and sufficient evidence; Reading of affidavits to grand jury; Failure to indorse names of witnesses upon indictment.

People v. Glen, 805, 897.

NEW YORK (CITY OF).

Construction of paving contract; General covenant to maintain and repair qualified by a specification.

O'Keeffe v. City of New York, 474, 476.

JUDGMENT.

When judgment in an action is not a bar to another action for same cause brought by a co-defendant therein against some of the defendants in the first action; Action by residuary legatee against trustees; May be commenced before death of life tenant.

Earle v. Earle, 480, 488.

PER CURIAM.**FORECLOSURE ACTION.**

When sale cannot be postponed by a judgment which is practically a perpetual stay of proceedings.

Breed v. Ruoff, 840, 841.

JUDGMENT.

Modified by awarding interest demanded in supplemental answer.

Fortunato v. Mayor, etc., of New York, 606, 609.

CONTRIBUTORY NEGLIGENCE.

Evidence of, held sufficient to sustain order of Appellate Division reversing a judgment for plaintiff.

Lonergan v. Erie R. R. Co., 616.

ATTORNEY AND CLIENT.

Lien of attorney on fund created by settlement made by parties in good faith without his consent; Defendant pays over fund to client, without providing for lien, at his peril.

Fenwick v. Metropolitan Street Ry. Co., 633, 634.

RAILROADS.

New York and Harlem Railroad Company held not liable for consequential damages resulting from erection of steel viaduct upon which its trains are run in and through Fourth avenue in New York city, on authority of *Fries v. N. Y. & Harlem R. R. Co.* (169 N. Y. 270) and *Muhler v. N. Y. & Harlem R. R. Co.* (173 N. Y. 549).

Keirns v. N. Y. & Harlem R. R. Co., 642.

Ex. J. M.

DECEDENT'S ESTATE — Continued.

power of alienation for more than two lives in being;
Failure to recover against defendant as heir at law does
not preclude recovery against him as devisee; Appeal;
Statute of Limitations; Question of fact.

Matteson v. Palser, 404, 408.

INTEREST.

When contractors are entitled to, from date of presentation of
claim.

Sweeny v. City of New York, 414, 415.

MURDER.

Sufficiency of evidence; Power of Court of Appeals to reverse
judgment entered upon verdict of jury; Code Cr. Pro.
§ 528; Homicide committed by person engaged in quar-
rel with another; When it constitutes murder; When
manslaughter; Charge to jury; Reviewed and held not
erroneous.

People v. Fillippelli, 509, 511.

RAILROADS.

New York and Harlem Railroad Company liable for conse-
quential damages resulting from erection of steel via-
duct, upon which its trains are run in and through
Fourth avenue, in New York city; L. 1892, ch. 339.
(Dis. op.)

Muhiker v. N. Y. & Harlem R. R. Co., 549, 565.

NEGLIGENCE.

Injury resulting from overcrowded platform of horse car;
When negligence of company a question of fact; Con-
tributory negligence. (Con. op.)

Cattano v. Metropolitan Street Ry. Co., 535, 578.

WERNER, J.

NEGLIGENCE.

Fellow-servant. (Dis. op.)

Simone v. Kirk, 7, 17.

PARTITION.

Insufficient reservation of growing crop by referee at the sale.

Banta v. Merchant, 292, 298.

APPEAL.

Nonsuit; Contract; Agreement for procurement of legislative
action for the purpose of depreciating price of corporate
securities void as against public policy.

Veazey v. Allen, 359, 367.

CRIMES.

Grounds of motion for dismissal of indictment specified in
Code Cr. Pro. § 313, not exclusive; Appeal; Charge to
grand jury not properly authenticated cannot be con-

7265 013

